IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

JOSE V. BACA, ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Claims dismissing the petition therein as to four of the plaintiffs and holding four others entitled to recover on a limited basis.

OPINION BELOW

The opinion of the United States Court of Claims is not yet officially reported. The opinion of the Court, which adopts the opinion of its Commissioner, together with the dissenting opinion of Judge Madden, is printed in Appendix A hereto.

In accordance with the Rules of the United States Court of Claims, the trial was limited to the claims of nine of the twenty-four plaintiffs and to the question of liability, the amount of recovery being reserved for future proceedings as provided in Court of Claims Rule 38(c).

JURISDICTION

The judgment of the United States Court of Claims (Appendix A, *infra* p. 1a) was entered June 8, 1960. Plaintiffs' Motion for Rehearing filed on June 15, 1960 was denied by the Court without opinion on July 15, 1960. (Appendix B, *infra* p. 19a) The Court of Claims had jurisdiction under 28 U.S.C. § 1491 (1958 Ed.). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1) (1958 Ed.).

QUESTIONS PRESENTED

This case presents two questions.

1. Inasmuch as the Congress of the United States has provided that the regular hours of labor for Wage Board employees of the United States shall not exceed forty hours per week and that all overtime shall be compensated for at the rate of not less than time and one-half, may the Department of the Army assign civilian bus drivers the duty of transporting persons to a remote desert installation and then designate four hours at the remote installation as being an "off-duty" period and deduct these hours in computing the time for which the employees are compensated?

2. May the United States "suffer or permit" an employee who is paid for eight hours of work a day to perform similar work for an additional four hour period and refuse to compensate him for such services on the ground that they were performed voluntarily?

STATUTES INVOLVED

Section 23 of the Independent Offices Appropriation Act, 1935, referred to as the Wage Board Statute, 48 Stat. 522 (1934), 5 U.S.C. § 673(c) (1958 Ed.) provides:

> "The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: Provided, *That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half.* * * *" (emphasis supplied)

33 Stat. 1257 (1905), as amended, 31 U.S.C. § 665(b) (1958 Ed.) provides:

> "No officer or employee of the United States shall accept voluntary service for the United States or employ personal service in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property."

STATEMENT OF THE CASE

The plaintiffs in the Court below are twenty-four civilian Wage Board employees of the Department of the Army all of whom were bus drivers at the White Sands Missile Range during all or part of the period from October 1951 through October 1957. The factual basis for the case can be stated very simply. The White

Sands Missile Range (formerly known as the White Sands Proving Grounds) is a military installation in an isolated desert region an hour and a half's drive, under good conditions, from El Paso, Texas. It is similarly remote from the other surrounding communities. During the period covered by this litigation, the bus drivers transported civilian and military personnel to the White Sands Missile Range in the morning and returned their passengers to the various surrounding communities in the evening. To perform their daily tour of duty, the bus drivers were required to pick up their buses at approximately 6 o'clock in the morning and at the conclusion of the day's work to return the buses at approximately 6 o'clock at night to the same parking lot from which they had started twelve hours earlier. The dispute in this case concerns primarily four of the intervening eight hours in each day, either in the morning or afternoon, during which the drivers remained at White Sands, but were designated as being "off duty".

Petitioners' contention is that their jobs claimed their entire day from 6 o'clock in the morning when they picked up their buses to 6 o'clock at night at the conclusion of their return run in the evening. They contend that they worked twelve hours a day and the practice of the Department of the Army of paying them for only eight hours violated the Wage Board Statute. In other words, the designation of four hours at White Sands as off-duty time did not, either practically or legally, affect the duration of their daily employment.

The majority of the Court did not find that the employees were able to use this so-called off-duty time effectively for their own purposes. In summary, the

opinion concludes that if the geographic isolation of the post were not considered, the time could have been effectively used for the drivers' own purposes.

The principal facts found by the Court are as follows (Opinion, pp. 4a-7a):

White Sands is located in a desert region of southern New Mexico. The nearest sizable towns are Las Cruces and Alamogordo, New Mexico, and El Paso, Texas. The headquarters area at White Sands is approximately 28 miles northeast of Las Cruces, approximately 52 miles southwest of Alamogordo, and approximately 51 miles north of El Paso (over the most direct route).

The White Sands bus service was originally established in order to provide transportation 5 days per week (Monday through Friday) for civilian employees and military personnel who worked at White Sands but who lived in or near Las Cruces, Alamogordo, or El Paso. Morning bus runs from each of the three towns mentioned to White Sands, and afternoon bus runs from White Sands to the three towns, were established. The bus drivers lived in the various towns from which service to White Sands was provided.

Providing the bus service required that each bus driver, as a normal pattern of operation, work each regular workday for approximately 2 hours in the morning (from about 6 to 8 a.m.) in operating a bus from the town of his residence to White Sands and in performing other duties directly related to such operation, and to work for another period of approximately 2 hours in the afternoon (from about 4 to 6 p.m.) in operating a bus from White Sands to the town of his residence and in performing other duties directly related to such operation.

During the interval of approximatey 8 hours between 8 a.m. and 4 p.m., the bus drivers while at White Sands were from time to time required to perform other work not directly involving the transportation of passengers.

Sometime in 1952, an arrangement was made by the management at White Sands whereby approximately half of the bus drivers were considered as being on duty during the morning until 12 noon and off duty from 12 noon until 4 p.m., while the remainder of the drivers were considered as being off duty from 8 a.m. until 12 noon and on duty after 12 noon.

Each bus driver had a period of approximately 4 hours each workday, either in the morning or in the afternoon, when he was regarded by the management at White Sands as being off duty. This "off-duty" time intervened between periods of duty.

The bus drivers were paid on the basis of an 8-hour day and a 40-hour week for the services that are involved in this litigation. The 8 hours of daily working time for which a driver was compensated consisted of the 2 hours in the morning involved in operating a bus from the town of the bus driver's residence to White Sands (and related activities); the 2 hours in the afternoon involved in operating the bus from White Sands back to the town of the driver's residence (and related activities); and another 4-hour period of duty either in the morning or in the afternoon. No compensation was received for the "off-duty" time that intervened between periods of duty.

Because of White Sands' isolation, and the lack of any practicable means of leaving the post, the bus drivers generally spent their "off-duty" time at White

Sands, waiting for their subsequent duties to begin. During the greater part of the period involved in this suit, the drivers' waiting time was usually spent in or near their parked buses, but in 1956 a waiting room, with facilities for recreation, was provided for the drivers by the management at White Sands. The drivers went to a cafeteria on the post and to the post exchange whenever they wished to do so.

The Court in adopting the Commissioner's Findings of Fact concluded that the bus drivers' off duty periods were occasionally switched to meet the transportation requirements of the transportation section and that the drivers were on some occasions assigned to work during their off-duty periods although such occasions were found by the Court to be infrequent. Plaintiffs formally excepted to this Finding. (Plaintiffs' Exceptions to the Commissioner's Findings, filed December 15, 1959, pp. 37-39, 44). It is, however, conceded that during the periods of so-called off-duty time the plaintiff bus drivers were not only available for call but were on occasion actually ordered to perform various services. Nor is it disputed that the military bus master had authority to switch the bus drivers' designated off-duty periods at the last moment in order to have drivers for particular runs available when they were required. (Tr. 632-633).

In 1952 one of the petitioners, Vick V. Serna, and another bus driver were assigned to assist the bus master. Later Serna was designated section leader. The Court found that it was anticipated that one of the section leaders would assist the bus master in the preparation, issuance and logging of trip tickets, in typing duty rosters, in answering the telephone and in relaying instructions to the drivers during the four

hour period from 8 a.m. to 12 noon and that the other section leader would perform these services from 12 noon to 4 p.m. The Court found that Mr. Serna, with the knowledge and acquiescence of the bus master, frequently rendered assistance to the bus master during his so-called off-duty time. The Army officials at White Sands advised Mr. Serna when he took the job that he would not be compensated for work performed during the off-duty periods. Mr. Serna took the job as section leader, having been led to believe that he would receive a promotion in lieu of overtime pay. (Tr. 918; Plaintiff's Requested Finding 69).

The Court of Claims held, Judge Madden dissenting, that scheduled off duty periods of two hours and less constituted compensable hours of labor, that scheduled off duty periods of more than two hours did not constitute hours of labor, and that petitioner Serna voluntarily worked overtime and therefore could not claim overtime pay.

REASONS FOR GRANTING THE WRIT

This case presents two principal issues of general public importance. The first, which concerns government employees generally, certain employees of government contractors and the estimated twenty-four million Americans who work in occupations covered by the Fair Labor Standards Act,[1] raises the question whether four hours of designated off-duty time at a remote location, where the time cannot be used effectively for an employee's own purposes, are to be deducted in computing the duration of the employee's work day.

The second question applies to government employees only and concerns whether they can be required or

[1] United States Department of Labor, Annual Report 1959, p. 217

permitted to perform overtime work without compensation.

I.

The basic issue presented by this case is whether petitioners devoted a twelve-hour day to their employer, the Department of the Army, or whether the assigned off-duty periods at White Sands Missile Range are to be deducted in computing their hours of labor. The Wage Board Statute, 48 Stat. 522, 5 U.S.C. § 673(c) (1958 Ed.) provides:

> "* * * That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half. * * *"

The Court of Claims held that when bus drivers were assigned off-duty periods of two hours or less, it would not have been possible for them to use this time effectively for their own purposes even if White Sands had not been located in an isolated desert region. Consequently, the Court concluded that this so-called off-duty time was necessarily spent in readiness to perform the next tour of duty and was therefore spent predominantly for the Government's benefit. (Opinion, pp. 13a-16a). However, with respect to the off-duty periods of more than 2 hours, including the four-hour break, the Court concluded that if the factor of geographic isolation were ignored, this time theoretically could have been used effectively for the drivers' own purposes and that "[t]heir election generally to remain at White Sands during the four-hour waiting periods was not predominantly for the benefit of the Government but, instead, was due to the isolation of the post in

a desert area and the inconvenience of going elsewhere." (Opinion, p. 8a).

This is in effect a holding as a matter of law that the factor of geographic isolation is not to be considered in determining whether the drivers could have used the time effectively for their own purposes and whether their forced presence at the desert location was predominantly for their own benefit or for that of the Government. As pointed out by Judge Madden in his dissenting opinion, this legal position forces the Court to ignore important practical considerations affecting the drivers' employment. As he indicated, the Court gave no weight to the following:

(1) the plaintiffs had uses for their time other than lying under buses in a parking lot to get out of the sun, going to a snack bar at White Sands, or similarly idling away their time at a remote desert installation;

(2) that it was impossible for the drivers to get off the post during their four-hour off-duty period since there was no available public transportation and they could not have the use of their own automobiles because they drove Army buses to the Missile Range;

(3) that the bus drivers had to be at White Sands in order to drive the other employees back to the surrounding communities at the conclusion of the working day;

(4) without their presence during the four-hour "off-duty" period there was no practical and economic way for the Army to have the buses driven in the morning and in the evening and on-post runs made during the day.

The Court of Claims has interpreted the leading cases in this field, *Armour & Co.* v. *Wantock*, 323 U.S.

126 (1944), and *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), as sanctioning a hard-and-fast rule that four hours of off-duty time, no matter where granted, are not to be counted as "hours of labor" since it is conclusively presumed that the employee involved could effectively use four hours for his own purposes (except for such factors as geographic isolation which may not be considered).

The Court's failure to consider geographic isolation is reflected not only in the distinction it makes between off-duty periods of more than two hours and shorter periods, but also in the Court's reliance on *Abbott* v. *United States*, 138 C. Cls. 449, 464 (1957). This case is relied upon by the Court to establish the proposition that

> "where an employee has complete freedom during a waiting period to go where he pleases and do what he pleases, so long as he is at the proper place when the time arrives for the beginning of his actual labor, the waiting time is not working time, and is not compensable." (Opinion, p. 8a).

The *Abbott* case, however, involved a claim by Panama Canal pilots that they were entitled to be paid for time spent in their own homes after being notified by telephone that they would have to go to work and that a car would call for them at a specified time. The Court of Claims concluded in the case presently before the Court that time spent sitting under a bus in the desert is to be considered no differently from time spent in the comfort of one's home while waiting to go to work.

In petitioners' view, there is nothing in the decisions of this Court which requires such a restricted interpretation of the hours which an employee devotes to his employer. The Court of Claims in its opinion

distinguished the cases upon which plaintiffs relied on the ground that those cases involved employees who, although sleeping, eating or otherwise amusing themselves, were held entitled to compensation because they were expressly required to remain on their employer's property. The bus drivers, the Court concludes, were not expressly required to remain at White Sands but did so merely because the Missile Range was in an isolated desert area and they had no transportation to enable them to go elsewhere. In terms of the holdings of this Court, this distinction is not a proper one. This Court has held that the determination of whether or not waiting time is work time is "dependent upon all circumstances of the case", *Armour & Co.* v. *Wantock*, *supra*, at p. 133, and involves consideration of such factors as "whether the time is spent predominantly for the employer's benefit", *ibid.*, "consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances", *Skidmore* v. *Swift & Co.*, *supra*, at p. 137. In such cases the Court must determine whether the time "even though pleasurably spent . . . was spent in the ways the men would have chosen had they been free to do so", *id.* at 139. The overriding consideration is that hours worked "'are not limited to the time spent in active labor but include time given by the employee to the employer'", *id.* at 138. This Court has not relied on technicalities. If formal orders to the bus drivers to remain at White Sands were technically withheld, that does not change the fact that the drivers were as much restricted as if such orders had been given. Furthermore, it was the Government which caused these drivers to be left in the middle of the desert without means of going elsewhere and also which required their presence for the return runs in the

evening and to drive regular and special runs on the post during the day. It is indeed a surprising state of affair that the provisions of the Wage Board Statute requiring time and a half compensation for all hours worked in any one day in excess of eight can be circumvented by merely withholding an unnecessary order.

The Court of Claims' holding that periods of off-duty time of from two to four hours are not compensable, no matter where they take place, affects not only Wage Board employee bus drivers for the Department of the Army and Wage Board employees generally but all persons whose working hours are governed by federal legislation. This group includes not only Civil Service employees compensated under the Federal Employees Pay Act of 1945, 59 Stat. 295 (1945), as amended, 5 U.S.C. §§ 901-958 (1958 Ed.), laborers and mechanics on public works subject to the Eight Hour Law, 27 Stat. 340 (1892), as amended, 40 U.S.C. § 321-326 (1958 Ed.), employees of contractors furnishing supplies to the United States subject to the Walsh-Healey Public Contracts Act, 49 Stat. 2036 (1936), as amended, 41 U.S.C. § 35 (1958 Ed.), employees of the Postal Field Service compensated under the Postal Field Service Compensation Act of 1955, 69 Stat. 88, as amended, 39 U.S.C. §§ 951-1038 (1958 Ed.), but also the estimated twenty-four million persons covered by the Fair Labor Standards Act, 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-219 (1958 Ed.). The reason for this is that the federal courts in determining what constitutes hours of labor

[1] Section 201, 5 U.S.C. § 911 (1958 Ed.), provides, with certain exceptions, that for civilian employees of the government, all hours worked "in excess of forty hours in any administrative work week" shall be considered overtime.

have relied on the two leading cases in this field, *Skidmore* v. *Swift*, *supra*, and *Armour* v. *Wantock*, *supra*, interchangeably in cases involving the determination of what constitutes hours of labor not only under the Fair Labor Standards Act but also under the Federal Employees Pay Act of 1945, as amended,[3] the Wage Board Statute, the Eight Hour Law, and other similar legislation. See e.g., *Armstrong et al.* v. *United States* (C. Cls. No. 145-56, decided Jan. 14, 1959); *Winsberg* v. *United States*, 120 C. Cls. 511, 517 (1951); *Gaetke* v. *United States*, 136 C. Cls. 756, 759-760 (1957).

The decision of the Court of Claims, if allowed to stand, clearly sanctions the practice of splitting shifts at a remote location with a curious and distressing caveat; and an employer seeking to take advantage

[3] It must be acknowledged that Federal employees covered by the Federal Employees Pay Act of 1945, as amended, are less likely to be adversely affected by the Court's decision than are the other classes of persons enumerated, since a 1954 amendment to the Pay Act precludes splitting working days by off-duty periods of more than one hour except where a determination is made by the designated official that to do so is required for the efficient operation of the service and that substantially increased costs would otherwise result. 5 U.S.C. § 944(2) (1958 Ed.). This statutory provision, which does not apply to Wage Board employees such as the plaintiffs, significantly limits the likelihood that Federal employees generally will have shifts split by a four-hour off-duty period. The legislation does not, however, deal with the question of whether a particular period designated as being "off-duty" must nevertheless be considered as compensable hours of labor under Section 201 of the Federal Employees Pay Act of 1945, 5 U.S.C. § 911 (1958 Ed.), which provides for overtime compensation for all hours of work in excess of forty in any week. The determination of whether designated off-duty periods nevertheless constitute hours of labor is "dependent on all the circumstances of the case, whether the time is spent predominantly for the employer's benefit and whether it embraces time given by the employee to the employer". In other words, this is the precise issue in this case.

of the Court's opinion would be well advised not to assign his employee an off-duty break of less than two hours, since the Court has held that breaks of that duration or less would be compensable. It would then be to his financial interest to assign breaks of more than two hours thereby converting the traditional concept of an eight-hour working day into a work day of from ten to thirteen hours. A change of this significance in the work patterns of countless persons should receive the most careful consideration of this Court.

The danger of such abuse is no matter of idle speculation as is revealed by the record in this case. Certain of the bus drivers at White Sands had particularly long morning and evening runs requiring them to start work half an hour earlier and stop work half an hour later than the other bus drivers. Working under the theory later adopted by the Court of Claims, the Army conceived of a plan to avoid the payment of any overtime which can only be characterized as vindictive. The Army did not take the position that these men were working a thirteen-hour day and should be paid for thirteen hours. It did not take the position that they worked one hour longer than the other drivers and should be paid for nine hours. Instead, the bus drivers with these long hours were granted the meaningless windfall of an extra hour of off-duty time at White Sands. If such conduct is permissible on the part of an employer, an eight-hour day has little meaning.

To employees covered by the Fair Labor Standards Act, the implications of the Court of Claims' decision are in some respects more serious than to the other classes of persons affected, since the decision creates a split between the Court of Claims and the Court of

Appeals for the Fourth Circuit on the question of what constitutes "hours of labor" for employees whose duty includes waiting time. This split is particularly significant in terms of the administration of the Fair Labor Standards Act because of the provisions of Section 16 of that Act, 29 U.S.C. §216(c) (1958 Ed.), which provides in part that the Secretary of Labor may bring an action on behalf of employees to recover wage claims only if settled issues of law are involved. The split between the Court of Claims and the Fourth Circuit raises precisely the type of uncertainty that could deprive the Secretary of Labor of jurisdiction in similar cases.

In connection with the administration of the Fair Labor Standards Act, the Department of Labor issues interpretative bulletins which have the function of informing the public of the position of the Administrator of the Wage and Hour and Public Contract Division with respect to the interpretation of the Act. He is of course bound by judicial interpretation of the Act. Interpretative Bulletin, *Hours Worked*, includes the following statements:

> "Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case." (29 C.F.R. 785.3(b)(2)(ii)
>
> * * *
>
> "*On-call time.* An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call.' An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call." (29 C.F.R. 785.3(b)(3)).

If the Court of Claims decision were taken into consideration changes would be required in the interpretative bulletin, to reflect the compensability of short breaks and that breaks of more than two hours, even at remote locations, are not compensable.

The position of the Fourth Circuit is set forth in the case of *Wright* v. *Carrigg*, 275 F. 2d 448 (4th Cir. 1960), reversing and remanding 174 F. Supp. 27 (E.D.S.C. 1959). The *Wright* case involved a driver who was employed to drive a truck over a route between certain South Carolina cities for the purpose of picking up and depositing mail at various railroad stations. Although the time he spent in driving amounted to four to four and one-half hours each day, he spent an additional three hours waiting for trains at certain locations. The employee was advised by his employer before taking the job that he would not be paid for the waiting time. Nevertheless, the Court classified these waiting periods as compensable hours of employment. It in part based its holding upon the consideration that the employee could not use the time effectively for his own purposes. Specifically, he could not secure other employment or find suitable sleeping accommodations. This aspect of the District Court opinion was specifically affirmed by the Court of Appeals for the Fourth Circuit when it stated:

> "The District Court held, correctly, that waiting time should be included in the hours for which the employee is entitled to be paid."

The Court of Claims on the other hand considers the duration of the break as the sole determinant.

This issue of what constitutes "hours of labor", therefore, should be clearly decided by this Court by virtue of the public importance involved and the conflict which the Court of Claims' decision creates with the holding of the Fourth Circuit in *Wright*.

II.

This case also presents the question of whether or not the United States may suffer or permit an employee to perform useful services and decline to compensate him on the ground that the services were voluntary. This is a particularly important question for government employees generally, since the statutory provisions pertaining to voluntary services differ from those applicable to employees covered by the Fair Labor Standards Act. The Court's opinion, if allowed to stand, would sanction the efforts of overly zealous government officials in forcing employees desiring advancement, or even the retention of their jobs, to perform "voluntary" overtime duty.

Petitioner Yick V. Serna, testified that he did not volunteer for the position of section leader but felt that he was directed to take it. Furthermore, he was told at the time he took the job that he would be working practically all day but would not receive overtime compensation. Instead, he was told he could look forward to a promotion. Two years later he received a meritorious increase raising his pay from $2.03 to $2.12 an hour. (Tr. 142, 918-919).

As a matter of law, overtime work performed under these circumstances should not be considered voluntary. Any Government employee, like Mr. Serna,

working overtime under similar circumstances is undoubtedly interested in receiving a promotion. A promotion is certainly a form of compensation, though not the one provided by Congress. If looked at realistically, the Army has sought to compensate an employee for overtime work, which the Court of Claims found was performed with its knowledge and acquiescence, not at the statutory rate of time and one-half but with a promise of a promotion at a future date.

On the other hand, if credence is to be given to the fiction that Mr. Serna was induced to perform these services on a truly voluntary basis, he should nevertheless be compensated at the statutory rate. To do otherwise would completely negate the requirement that voluntary services shall not be accepted for the United States, 33 Stat. 1257 (1905), as amended, 31 U.S.C. § 665(b) (1958 Ed.). This is a salutory provision. Perhaps some employees would agree to work on a voluntary basis but in most instances the possibility of their doing so would create an opportunity for administrative officials to force employees to work without compensation. The factual analysis required in each such case to determine whether or not the hours of labor were voluntarily contributed or were induced by other factors would put a significant and unnecessary burden on the courts and would place many government employees in an unfair position.

Under Section 3(g) of the Fair Labor Standards Act, 29 U.S.C. § 203(g) (1958 Ed.) compensable employment embraces any period of time during which an employer "suffers or permits" an employee to work. Consequently, if an employer covered by the Fair Labor Standards Act merely has knowledge that an employee is working, the time is compensable.

The Department of Labor Interpretative Bulletin *Hours Worked* contains the following provision:

> "(a) *Employees 'suffered or permitted' to work.* (1) Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time." (29 C.F.R. 785.3(a)).

There is, consequently, no advantage to an employer either to encourage or to require an employee to voluntarily work overtime, or even to close his eyes to what is going on. E.g., *Kappler* v. *Republic Pictures Corp.*, 59 F. Supp. 112, 116 (S.D. Iowa 1945), *aff'd*, 151 F.2d 543 (8th Cir. 1945). With respect to Federal employees Congress has provided that "no officer or employee of the United States shall accept voluntary service for the United States * * *" 33 Stat. 1257 (1905), as amended, 31 U.S.C. § 665 (b) (1958 Ed.). This provision has now been interpreted by the Court of Claims to mean that if voluntary services are accepted, contrary to the statutory requirement, compensating the employee involved is not necessary. The Court of Claims previously held in *Schaible* v. *United States*, 135 C. Cls. 890 (1956), that government employees could not be compelled by their superiors to accept compensation for overtime work at rates lower than that specified by law. In this connection the Court explained its reasoning in the following language:

> "The clear weight of authority and the better reasoning favor the view that full statutory compensation of public employees is mandatory, on grounds of public policy. Any suggestion of barter and trade in public employment is thereby eliminated. In order to make certain of this result, protection is afforded against the pardonable, and even commendable zeal of administrative officials in the application of statutory standards through regulations, if as a matter of law their sights were too low." (135 C. Cls. at 898).

Subsequently, in *Anderson* v. *United States*, 136 C. Cls. 365 (1956), the Court of Claims held with respect to overtime services performed by customs inspectors that, contrary to the contention of the Government, these services were not really voluntary since the inspectors were "induced" by their superiors to perform them. The Court also based its holding on an alternate ground which it stated as follows:

> "If, under the facts, the services could be said to have been performed voluntarily within the full meaning of the word, the decision in *Farley*, *supra*, is authority for the services being compensable notwithstanding. The analysis in *Handly*, *Schaible*, and *Sanderson* cases, filed January 16, 1956, is to the same effect." (136 C. Cls. at 369).

In the present case, the Court has departed from *Anderson* and *Schaible*, *supra*, and returned to an 1890 holding in *Goode* v. *United States*, 25 C. Cls. 261, 267 (1890), which stood for the proposition that if an employee performs services without objection and upon the implied condition that he is not to charge for his services, he is estopped from later demanding compensation. (Opinion, p. 18a). This is a harsh doctrine and will lead to harsh results in this and many

other cases. Nor should *Goode* now be considered a precedent of any value since it was decided 15 years before Congress prohibited the acceptance of voluntary services.[4]

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[4] Even ignoring the 1905 statute the Court of Claims in relying on the *Goode* case has gone far beyond anything that *Goode* was ever intended to hold. The *Goode* case involved a government employee who signed aboard a government ship as a paymaster's yeoman and performed the duties of a recorder in the United States Coast and Geodetic Survey. In his suit filed in the Court of Claims he later sought additional compensation for the services he had performed as a member of the Survey. The Court held that he was not entitled to receive compensation for two jobs at the same time and that while holding the position of paymaster's yeoman he could agree to perform the duties for the Survey. *Goode* was one of a line of cases, principally *Converse* v. *United States*, 62 U.S. (21 How.) 463 (1859); *United States* v. *Brindle*, 110 U.S. 688 (1884); *United States* v. *Saunders*, 120 U.S. 126 (1887); *Glavey* v. *United States*, 35 C. Cls. 242, 253-256 (1900), which turned on Rev. Stat. § 1765, 5 Stat. 349 (1839), which provided that government office holders or employees being paid for one position could not receive compensation for discharging the duties of any other office or appointment unless expressly authorized by law. The holding of these cases and the proper interpretation of these statutes was summarized in *United States* v. *Saunders*, 120 U.S. 126 (1887) where the Court stated:

> "... We are of opinion that, taking these sections all together, the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances, or pay for other services which may be required of him either by act of congress or by order of the head of his department, or in any other mode, added to or connected with the regular duties of the place which he holds; but that they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case he is, in the eye of the law two officers, or holds

The decision of the Court that a government employee may not be compensated for voluntary services performed with the knowledge and acquiescence of his superiors touches in a profound way every man and woman who works for the United States. It puts government employees at the mercy of zealous superiors who may control their opportunity for advancement by whether or not they voluntarily agree to perform as many as four hours of overtime service a day. If this question is not speedily and directly resolved, government disbursing officers will at their peril pay salary and wage claims which the Court of Claims previously indicated were perfectly proper.

Petitioners believe that so-called voluntary services of the type performed here should properly be held to be compensable. However, this matter is of such extreme importance that whichever way it is to be decided, a clear and unequivocal pronouncement by this Court is required.

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two places or appointments, the functions of which are separate and distinct, and, according to all the decisions, he is in such case entitled to receive the two compensations. In the former case he performs the added duties under his appointment to a single place, and the statute has provided that he shall receive no additional compensation for that class of duties, unless it is so provided by special legislation. . . ."

It Goode had been successful in his suit, he would have been paid two salaries at the same time. That case does not form a basis for denying petitioner Serna, an employee paid by the hour, compensation for time during which he would not otherwise receive any compensation. No element of double compensation is involved in Serna's case. There are two alternatives: either Mr. Serna gets paid at the statutory rate or he gets paid nothing for his overtime work.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1960

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 489-57

(Decided June 8, 1960)

JOSE V. BACA, ET AL.

v.

THE UNITED STATES

Mr. Edgar H. Brauer for the plaintiffs. *Messrs. Lorenzo A. Chavez, Melvin H. Robins, Thurman Arnold, Chavez, Ortega & Robins* and *Arnold, Fortas & Porter* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

Opinion

PER CURIAM: This case, which is a suit by plaintiffs as civilian bus drivers at a military post to recover overtime compensation, was referred under Rule 45(a) to Mastin G. White, a trial commissioner of this court, with directions to make findings of fact and to recommend conclusions of law which the commissioner has done in a report filed November 10, 1959.

The court having considered the evidence, the briefs and argument of counsel and being in agreement with the recommendations of the commissioner hereby adopts his opinion and findings which are hereinafter set forth as the basis for its judgment in this case. Plaintiffs Jose V. Baca (1), Floyd D. Campbell (4), J. E. Jones (13), Rodolpho Martinez (17) and James M. Simpson (22) are entitled to recover and judgment will be entered to that effect with the amount

of recovery to be determined pursuant to Rule 38(c). Plaintiffs Verney R. Bunch (3), Cecil R. Gillespie (9), Wertie L. Haney (12) and Vick V. Serna (21) are not entitled to recover, and the petition as to them will be dismissed.

It is so ordered.

MADDEN, *Judge*, dissenting:

The court has decided that the plaintiffs are not entitled to be paid for all of the time spent at White Sands because, during several hours of that time, "they were actually off duty and not performing any services for the Government, but were free to go where they pleased and do what they pleased." The quoted statement is not applicable to the plaintiffs' situation, unless the plaintiffs had such peculiar mentalities and tastes that the only things they pleased to do were to lie under the buses in the parking lot to get out of the sun, or to go to the snack bar to get a cup of coffee, or to go to the library and read, or to go swimming in the pool.

It was, as a practical matter, impossible for them to get off the Army post during their four hours of unpaid time. There was no public transportation from the post. They of course could not have their own automobiles, because they drove to the post in the Army buses. They had to be at the Army post in order to do the Army's work of driving the buses back to the cities where the other people who worked at the post lived. Try as one will, he cannot think of any practical and economical way in which the Army could have had these buses driven, morning and evening, and the "B" runs made during the day, without requiring the plaintiffs to wait four hours for the evening run. The plaintiffs were, therefore, at the post in the desert for Army purposes, and pursuant to the statute, and the judicial precedents, they are entitled to be paid for their time.

If one is hired to drive a party of geologists out to a point in the desert and is told that his party will return to

the vehicle in four hours, and that in the meantime he may do as he pleases, who would say that his pay did not run on during the four hours? Would the fact that there were geological treatises or comic books in his vehicle, or coffee in a thermos jug, or water in a nearby pool prove that he was not there for his employer's purposes and benefit? Would he not have been "engaged to wait"? *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137; *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133; *Missouri K. and T. Ry. Co.* v. *United States*, 231 U.S. 112, 119. And would the fact that the same event occurred every working day over a period of months or years affect its legal consequences?

Opinion of the Commissioner

This action was instituted by the plaintiffs for the recovery of overtime compensation under the portion of section 23 of the act of March 28, 1934 (48 Stat. 509, 522), as amended (5 U.S.C., 1958 ed., 673c), which provides:

> * * * That the regular hours of labor [for wage-board employees of the Government] shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half.

At the request of plaintiffs' counsel, and with the acquiescence of defendant's counsel, the trial was limited under Rule 22(b) to the claims of those plaintiffs who are mentioned in findings 27-35, and the proceedings with respect to all other plaintiffs were held in abeyance. In this connection, counsel for the plaintiffs conceded that if none of the plaintiffs named in findings 27-35 is entitled to recover, none of the other plaintiffs is entitled to recover.

During some part of the 6-year period immediately preceding the date (October 18, 1957) of the filing of the petition in this case, each of the plaintiffs was employed by the Department of the Army as a civilian bus-driver at a military post which was known during the period in question

as the White Sands Proving Ground, but which is now known as the White Sands Missile Range. (For the sake of convenience, this military post will usually be referred to in the opinion as "White Sands.") The plaintiffs' compensation schedules were fixed by the Army-Air Force Wage Board.

White Sands is located in a desert region of southern New Mexico. The nearest sizable towns are Las Cruces and Alamogordo, New Mexico, and El Paso, Texas. The headquarters area at White Sands is approximately 28 miles northeast of Las Cruces, approximately 52 miles southwest of Alamogordo, and approximately 51 miles north of El Paso (over the most direct route).

The White Sands bus service was originally established in order to provide transportation 5 days per week (Monday through Friday) for civilian employees and military personnel who worked at White Sands but who lived in or near Las Cruces, Alamogordo, or El Paso. Morning bus runs from each of the three towns mentioned to White Sands, and afternoon bus runs from White Sands to the three towns, were established. A one-way bus fare of 25 cents was collected from the bus riders. A similar morning and afternoon bus service between Hatch, New Mexico, and White Sands was established later during the period involved in the present suit. The bus drivers lived in the various towns from which service to White Sands was provided under the system.

Providing the bus service required each bus driver, as a normal pattern of operation, to work each regular workday for approximately 2 hours in the morning (from about 6 to 8 a.m.) in operating a bus from the town of his residence to White Sands and in performing other duties directly related to such operation, and to work for another period of approximately 2 hours in the afternoon (from about 4 to 6 p.m.) in operating a bus from White Sands to the town of

his residence and in performing other duties directly related to such operation.

During the interval of approximately 8 hours between about 8 a.m. and about 4 p.m., the bus drivers from time to time were required while at White Sands to perform other work not directly involving the transportation of passengers, as follows:

(1) If a bus needed gasoline, oil, or water, the need was supplied by the driver from facilities provided for the purpose by the management. While the evidence on the point is not clear, it is inferred that a bus driver did not devote more than 1 hour per week to such work, on the average.

(2) It was usually necessary for a driver to wash his bus once or twice each week, and this required anywhere from 45 to 90 minutes of a driver's time per week.

(3) Each driver was required to perform a rather thorough weekly check on his bus and to make a report concerning the results of the check. The bus was greased during the course of the checking operation. This weekly checking and greasing required an average of approximately 1 hour per week.

(4) If a bus needed mechanical repairs, the bus driver drove the bus a short distance to the repair shop. Thereafter, the driver was required to go to the repair shop and get the bus at 4 p.m. (or earlier if he preferred and the repairs had been completed) in order that it might be used for the afternoon run to the town of his residence. However, this type of work was infrequent and, if averaged out on a weekly basis, it required only a few minutes of a bus driver's time per week.

(5) Another task performed by the bus drivers was the "policing" of the bus area each day in order to remove trash from the area. It appears that the drivers did not devote more than 10 or 15 minutes per day, on the average, to this type of work.

(6) If a bus tire needed fixing, it was the responsibility of the driver to remove the wheel containing the defective tire, put on a spare wheel and tire, and take the defective tire (on its wheel) to the tire-repair shop. This type of work was infrequent and, if averaged out on a weekly basis, required only a negligible amount of a bus driver's time per week.

In order to make provision for the performance of the duties outlined in the preceding numbered paragraphs, the management at White Sands, during the early part of the period involved in this litigation, designated the morning hours until 12 noon of each workday as on-duty time for the bus drivers. Hence, each driver had approximately 20 hours of on-duty time per week for the performance of duties that required 5 or 6 hours of actual work, on the average. The time from 12 noon until 4 p.m. of each workday was considered by the management at White Sands as off-duty time for the drivers.

Sometime in 1952, because congestion at the single wash rack occasionally made it difficult for some drivers to wash their buses during the morning duty hours, an arrangement was made by the management at White Sands whereby approximately half of the bus drivers were considered as being on duty during the morning until 12 noon and off duty from 12 noon until 4 p.m., while the remainder of the drivers were considered as being off duty from 8 a.m. until 12 noon and on duty after 12 noon.

Therefore, except for certain special situations that will be discussed subsequently, each bus driver had a period of approximately 4 continuous hours each workday, either in the morning or in the afternoon, when he was regarded by the management at White Sands as being off duty. This "off-duty" time intervened between periods of duty.

The bus drivers were paid on the basis of an 8-hour day and a 40-hour week for the services that are involved in

this litigation. The 8 hours of daily working time for which a driver was compensated consisted of the 2 hours in the morning involved in operating a bus from the town of the bus driver's residence to White Sands (and related activities); the 2 hours in the afternoon involved in operating the bus from White Sands back to the town of the driver's residence (and related activities); and another 4-hour period of duty either in the morning or in the afternoon. No compensation was received for the "off-duty" time that intervened between periods of duty.

In so far as the management at White Sands was concerned, the bus drivers were free to go where they wished and to do what they pleased during their "off-duty" time. Because of White Sands' isolation, however, and the lack of any practicable means of leaving the post (at least during the early part of the period involved in this action), the bus drivers generally spent their "off-duty" time at White Sands, waiting for their subsequent duties to begin. During the greater part of the period involved in this suit, the drivers' waiting time was usually spent in or near their parked buses, but in 1956 a waiting room, with facilities for recreation, was provided for the drivers by the management at White Sands. The drivers went to a cafeteria on the post and to the post exchange whenever they wished to do so; and they could have gone to the post library or to a swimming pool on the post, but it appears that none of them did.

The first question to be decided is whether the daily 4-hour periods which the management at White Sands regarded as being off-duty time for the bus drivers were actually "hours of labor," within the meaning of that term as used in the governing statute. In this connection, it is clear at the outset that an employee need not be engaged continuously in physical or mental exertion on behalf of his employer in order to be in a working status and thus entitled to compensation. On the contrary, time spent while

waiting to perform actual labor constitutes working time under some circumstances and, therefore, is compensable. However, it is characteristic of the cases so holding that they involved situations where the employee was under orders from the employer to wait at a particular place, the employee was liable to be called upon at any moment for the performance of actual labor, and he was not at liberty to go away for the purpose of engaging in other activities of his own choice. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); *Farley* v. *United States*, 131 Ct. Cl. 776, 779 (1955); see *Missouri, K. & T. Ry. Co.* v. *United States*, 231 U.S. 112, 119 (1913). In other words, waiting time is working time only if the employee has been "engaged to wait." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137 (1944). It necessarily follows that in a situation where an employee has complete freedom during a waiting period to go where he pleases and do what he pleases, so long as he is at the proper place when the time arrives for the beginning of his actual labor, the waiting time is not working time, and is not compensable. *Abbott* v. *United States*, 138 Ct. Cl. 459, 464 (1957).

Upon applying the principles discussed above to the facts of the present case, the conclusion seems inescapable that the daily 4-hour waiting periods at White Sands which were regarded by the management as off-duty time did not constitute "hours of labor" and, therefore, are not compensable under the governing statute. As previously stated, the employees were free to go where they pleased and to do what they pleased during these waiting periods. Their election generally to remain at White Sands during the 4-hour waiting periods was not predominantly for the benefit of the Government, but, instead, was due to the isolation of the post in a desert area and the inconvenience of going elsewhere. See *Armour & Co.* v. *Wantock*, *supra*, at p. 133.

With respect to the point discussed above, it should be mentioned that during the 6 years involved in this litigation

there were some occasions when a bus driver spending an off-duty period at White Sands would be asked by a supervisor to help "police" the bus area, or to drive a bus to the repair shop, or to go to the repair shop and get a bus that had been repaired, or to perform some other chore requiring a few minutes of the bus driver's time. However, such instances were infrequent and the amount of working time involved in them was inconsequential. Therefore, such instances may properly be disregarded in the present litigation. *Armstrong v. United States* (Ct. Cl. No. 145-56, decided January 14, 1959, p. 6 of slip copy, cert. denied, 361 U.S. 825).

The plaintiffs contend that, in any event, the daily 4 hours of so called "off-duty" time must be considered as "hours of labor" during the period between November 1954 and March 1957 because of the promulgation of a pertinent regulation by the Department of the Army.

On September 1, 1954, section 210 (b) of the act of that date (68 Stat. 1105, 1112) amended section 604(a) of the Federal Employees' Pay Act of 1945 (59 Stat. 295, 303) by adding a paragraph which provided in part as follows:

> (2) Except where the head of each * * * department, establishment, or agency * * * determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to all officers and employees in his organization, * * * that breaks in working hours of more than one hour shall not be scheduled in any basic workday. [5 U.S.C., 1958 ed., 944(a)(2).]

Although (with certain exceptions not pertinent here) the Federal Employees Pay Act of 1945 is declared by section 102 of the act (5 U.S.C., 1958 ed., 902(e)) to be inapplicable to wage-board employees, the Department of the Army on November 3, 1954 revised its Civilian Personnel Regulations

so as to provide (among other things) that, both with respect to employees holding positions subject to the Classification Act and wage-board employees:

> Daily tours of duty will not be broken by off duty periods of more than one hour.

It was further provided in the amended regulations that:

> * * * Exception * * * will be made only in those cases where commanding officers of installations determine that their application would seriously handicap the performance of a *function* or where substantially increased costs would result.

Notwithstanding the promulgation by the Department of the Army in November 1954 of the amended regulations referred to in the preceding paragraph, the management at White Sands thereafter continued to operate the bus service on a split-shift basis, as previously discussed, with the bus drivers having a 4-hour period of "off duty" time each workday between tours of duty. However, until March 28, 1957, there was no formal written finding by the commanding officer of the post that the application to bus drivers at White Sands of the departmental regulation declaring that "Daily tours of duty will not be broken by off duty periods of more than one hour" would seriously handicap the bus service or result in substantially increased costs. The plaintiffs argue that an exception to this departmental regulation could be based only upon a formal written finding of the sort just mentioned and, accordingly, that no exception in the case of the bus drivers at White Sands was permissible during the period between November 3, 1954 and March 28, 1957.

It was not necessary for the Department of the Army to provide, with respect to wage-board employees such as the bus drivers at White Sands, that "Daily tours of duty will not be broken by off duty periods of more than one hour."

However, when the Department by regulation did extend to wage-board employees the benefit of such a provision, the regulation thereupon became binding on, and could not properly be ignored by, the civilian and military officials of the Department, so long as the regulation remained in effect. *Service* v. *Dulles*, 354 U.S. 363, 388 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 539-540 (1959); *Watson* v. *United States*, 142 Ct. Cl. 749, 756 (1958). In this connection, though, it will be noted that the regulation, in providing for the making of exceptions to the general rule, did not prescribe any particular form for the essential finding. It merely stated that exceptions could be made in those instances where commanding officers of installations *determined* that the application of the general rule would seriously handicap the performance of a function or result in substantially increased costs.

In the present case, although the commanding officer at White Sands did not make any formal written determination of the sort contemplated by the "exception" provision of the regulation until March 28, 1957, the purport of the pertinent evidence warrants an inference that the commanding officer continued to operate the bus service on a split-shift basis during the period between November 3, 1954 and March 28, 1957 because of his conclusion that to operate the service on a straight-shift basis would, in fact, seriously handicap the performance of the bus-service function or result in substantially increased costs, or both. Therefore, it appears that there actually was no violation in this case after November 3, 1954 of the departmental regulation establishing the general rule with respect to wage-board employees (including the bus drivers at White Sands) that "Daily tours of duty will not be broken by off duty periods of more than one hour," but authorizing exceptions in appropriate cases.

Furthermore, even if it were to be concluded that the commander at White Sands violated the departmental regu-

lation between November 3, 1954 and March 28, 1957 by operating the bus service on a split-shift basis, this would not help the plaintiffs' cause. The commander, of course, would have been answerable for the violation to his superiors in the departmental hierarchy. The violation would not, however, have entitled the bus drivers to additional compensation by converting into "hours of labor" time during which they were actually off duty and not performing any services for the Government, but were free to go where they pleased and do what they pleased.

We turn now to the consideration of a special situation that affected some bus drivers during certain weeks in the years 1952-1954. Sometime in 1952, the management at White Sands began to establish a free type of bus transportation known as "Class B" service. (The morning and afternoon transportation for pay between certain residential towns and White Sands, previously discussed in this opinion, was known as "Class A" service.) On a Class B run, free transportation was provided over a specified route and on the basis of a fixed schedule for military personnel or civilian employees, or both, needing such service in connection with the performance of their official duties. A typical Class B run was between two or more specified points within the exterior limits of the post and involved four round trips per day, each round trip requiring approximately 1 hour for completion. The first round trip would be made between approximately 8 and 9 o'clock in the morning; the second, between approximately 10:30 and 11:30 in the morning; the third, between approximately 12 noon and 1 o'clock in the afternoon; and the fourth, between approximately 3 and 4 o'clock in the afternoon.

Class B runs were customarily assigned on a weekly basis to bus drivers who also had morning and afternoon Class A assignments to operate buses between the civilian communities previously mentioned and White Sands. During the years 1952-1954, when such a Class B run was

assigned to a driver for a particular week, he was expected to make the four scheduled daily trips, as well as make his morning and afternoon Class A trips and perform at least some other duties during the week, such as obtaining gasoline, oil, and water, and performing the weekly checking and greasing operation. A driver operating four daily Class B trips of the sort mentioned in this paragraph during a particular week was customarily excused from washing his bus and from "policing" the bus area during that week. Any time during the workday at White Sands when such a driver was not driving his Class B run or performing other duties of the sort previously mentioned, he was considered by the management at White Sands as being in an off-duty status. One of these periods was the half-hour period at about the noon hour, and this was available and customarily used for the eating of lunch.

On a workday during a week when a particular bus driver was assigned to operate four daily Class B trips of the sort discussed in the preceding paragraph, as well as to operate the usual morning and afternoon Class A trips between the civilian community of his residence and White Sands, he ordinarily did not devote more than 8 hours out of the total period between about 6 a.m. and 6 p.m. to the performance of actual work for the Government. However, the periods of waiting time that intervened between periods of actual work were not long enough to permit the driver to leave the post for the purpose of engaging effectively in activities of his own choice, and this would have been so even if White Sands had not been located in an isolated desert region. Consequently, the so-called "off-duty" time was necessarily spent in readiness to perform the next tour of duty (except for the usual luncheon period around the middle of the day). For this reason, it is my opinion that these periods of waiting time (except the usual luncheon period) represented time spent predominantly for the Government's benefit, and that they should be regarded

as "hours of labor." See *Travis* v. *Ray*, 41 F. Supp. 6, 8 (W.D. Ky., 1941).

The conclusion stated in the preceding paragraph is pertinent only with respect to the particular weeks during which particular bus drivers were assigned to perform four daily Class B trips of the sort previously mentioned, as well as to operate the usual morning and afternoon Class A trips. At all times, the number of civilian bus drivers at White Sands exceeded the number of Class B runs; and each week during 1952-1954 there were some bus drivers with Class A assignments who were not assigned to Class B runs. These drivers either were on duty for the performance of miscellaneous duties from 8 a.m. until 12 noon and off duty from 12 noon until 4 p.m., or were off duty from 8 a.m. until 12 noon and on duty for the performance of miscellaneous duties in the afternoon. Such a driver's off-duty time should not be regarded as constituting "hours of labor," for the reasons given in an earlier portion of this opinion.

Sometime in 1954, the management at White Sands adopted a plan whereby each Class B run of the sort previously mentioned was divided between two drivers. One driver would take the two morning trips, and the other driver would take the two afternoon trips. The driver with the morning Class B assignment was on duty until 12 noon and off duty from 12 noon until 4 p.m., while the driver with the afternoon Class B assignment was off duty from 8 a.m. until 12 noon and on duty after 12 noon. For the remainder of the period involved in the present litigation, each driver with an on post Class assignment during a particular week, as well as a Class A assignment, had a period of 4 continuous hours sometime between his morning and afternoon Class A trips that constituted off-duty time. For the reasons previously stated, such off-duty time did not constitute "hours of labor," in my opinion.

A second special situation which perhaps should be commented upon relates to the establishment, sometime in

1952, of a mixed Class B and Class A daytime bus run between White Sands and Las Cruces.[1] It was a Class B run in that free transportation was provided for guards working at White Sands, and it was a Class A run in that other civilian or military personnel in an off-duty status could ride the bus by paying the customary 25-cent fare. This run was rotated on a weekly basis among the Las Cruces bus drivers with morning and afternoon Class A assignments. On this run, the driver left White Sands at 8 a.m. (after having completed his morning Class A trip from Las Cruces to White Sands) and arrived in Las Cruces at about 9 a.m. From the time of his arrival in Las Cruces until 2:30 p.m., the driver was free to go and do what he pleased, and he was regarded by the management at White Sands as being off duty. At 2:30 p.m., the driver began the return trip to White Sands, and he arrived there at about 3:30 p.m. The period between his mid-afternoon arrival at White Sands and his departure from White Sands to make his afternoon Class A trip back to Las Cruces was on duty time.

The only point that needs to be discussed in connection with the situation outlined in the preceding paragraph is whether the bus drivers' time in Las Cruces from about 9 a.m. until about 2:30 p.m. was actually off-duty time, as believed by the White Sands management, or constituted "hours of labor." It seems clear to me that since the bus driver was in his home town during this period, and was free to spend the time at his home (or elsewhere, if he preferred), and to do whatever suited his fancy, the period

[1] After the establishment of this mixed Class B and Class A bus run between White Sands and Las Cruces, any bus driver who was considered by the management to be off duty in the morning could, if he wished to do so, ride this bus to Las Cruces. Off-duty drivers occasionally went to Las Cruces in this fashion, but it was necessary for such a driver to take annual leave for the time from 12 noon (when his next on-duty period was scheduled to begin) until his actual return to duty at White Sands.

in question was properly regarded by the White Sands management as off duty time." Hence, it did not constitute "hours of labor" for which the bus driver was entitled to receive compensation.

Another special situation requiring discussion arose out of the establishment of a mixed Class B and Class A daytime bus run between White Sands and El Paso sometime during the first half of 1956. The driver to whom this run was assigned for a particular week would, after having made his morning Class A run to White Sands, leave White Sands at 9 o'clock in the morning for El Paso. Since the most direct route from White Sands to El Paso through the desert was normally closed to traffic at that time, the trip over a longer route would usually take about 2 hours. The driver would customarily get back to White Sands at about 1 p.m. The driver, while holding this assignment, was regarded by the management as being off duty from 8 a.m. until 9 a.m., and off duty again from the time of his return to White Sands from El Paso at about 1 p.m. until 4 p.m.

Applying the principles outlined in earlier portions of this opinion to the situation described in the preceding paragraph, it seems to me that the 1-hour period between 8 a.m. and 9 a.m. actually constituted waiting time spent predominantly for the benefit of the Government and, therefore, was within the category of "hours of labor." On the other hand, it appears that the 3-hour period in the afternoon, between the time of the bus driver's return to White Sands from El Paso at about 1 p.m. and the beginning at 4 p.m., of his actual work in preparing for his afternoon Class A trip, was sufficiently long to constitute an off-duty period rather than a waiting period predominantly spent for the benefit of the Government.

When the facts pertaining to the individual plaintiffs (see findings 27-35) are considered in relation to the legal principles discussed in this opinion, it appears that the

plaintiffs Jose V. Baca and J. E. Jones are severally entitled to additional compensation for the daily periods between 8 a.m. and 9 a.m. on those days during 1956-1957 when these respective drivers operated the daytime mixed Class B and Class A bus run between White Sands and El Paso, as well as a morning and afternoon Class A bus run; and that the plaintiffs Floyd D. Campbell, Rodolpho Martinez, and James M. Simpson are severally entitled to additional compensation for 3½ hours per day on those days during 1952-1954 when these respective drivers operated on-post Class B bus runs for two morning and two afternoon trips per day, in addition to operating morning and afternoon Class A bus trips. It further appears that the plaintiffs Verney R. Bianch, Cecil R. Gillespie, and Werttie L. Haney are not entitled to recover, and that the petition should be dismissed as to them.

The facts relating to the plaintiff Nick V. Serna are somewhat different from those relating to any other plaintiff whose cause was presented at the trial. The plaintiff Serna, after having had a period of previous employment as a bus driver at White Sands, resumed such employment on October 13, 1952. He was assigned to operate a Class A bus run between Alamogordo and White Sands. In December of 1952, he and another bus driver, in addition to performing their duties as operators of Class A bus runs, were assigned to assist the bus master. It was contemplated by the management at White Sands that one of these men would assist the bus master from 8 a.m. until 12 noon, and then would be off duty from 12 noon until 4 p.m.; and it was contemplated that the other man would be off duty from 8 a.m. until 12 noon, and would then assist the bus master from 12 noon until 4 p.m. The assistance consisted of preparing and issuing trip tickets to other drivers, typing duty rosters, answering the telephone, and relaying the bus master's instructions to other drivers. The plaintiff Serna, after becoming an assistant to the bus master, continued to operate the morning and afternoon

Class A bus trips between Alamogordo and White Sands, but he was not required to perform other duties of the sort customarily performed by bus drivers during their on-duty time at White Sands (such as "policing" the bus area, operating Class B bus runs, etc.).[2]

Although not required to do so, the plaintiff Serna, with the knowledge and acquiescence of the bus master, frequently rendered assistance (of the sort previously mentioned) to the bus master during his "off-duty" time at White Sands. Hence, it is clear that the plaintiff Serna actually performed services for more than 40 hours per week during many of the weeks that are involved in the present litigation. However, the evidence also makes it plain that it was mutually understood by the plaintiff Serna and the White Sands management, at the time when the plaintiff Serna was assisting the bus master during his "off-duty" time, that he would not be compensated for such services. Therefore, the work that he did during his "off-duty" time must be regarded as constituting voluntary services, for which he cannot afterwards properly claim compensation. *Goode* v. *United States*, 25 Ct. Cl. 261, 267 (1890). It necessarily follows that the petition should be dismissed as to the plaintiff Serna.

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[2] The plaintiff Serna was formally designated as a "section leader" in February 1956. His duties in that position were approximately the same as they had formerly been in his role as assistant to the bus master.

APPENDIX B

UNITED STATES COURT OF CLAIMS

No. 489-57

JOSE V. BACA, ET AL.

v.

THE UNITED STATES

Clerk's Office

Washington, D. C., July 15, 1960

To Attorney of Record and Assistant Attorney General and Commissioner.

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the plaintiff's motion for rehearing the following order:

Overruled.

Very truly yours,

WILLARD L. HART
Clerk, Court of Claims

FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 26 1960
JAMES R. BROWNING, Clerk

No. 405

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOSE V. BACA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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GEORGE COCHRAN DOUB,
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UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Claims (Pet. App. 1a–18a) are not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on June 8, 1960. A timely motion for rehearing was denied by the court on July 15, 1960. The petition for a writ of certiorari was filed on September 9, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, civilian bus drivers employed by the Department of the

Army are entitled to compensation for a designated 4-hour off-duty period, during which they were at liberty to do as they wished, except to the extent that their activities might be limited by the geographical location of their place of employment.

2. Whether petitioner Serna is entitled to compensation for services performed during his off-duty time, which services he was neither ordered nor required to perform.

STATUTE INVOLVED

Section 23 of the Independent Offices Appropriation Act, 1935, 48 Stat. 509, as amended, 5 U.S.C. 673c, provides:

> The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one half.

* * * * *

STATEMENT

Petitioners, civilian bus drivers employed by the Army at White Sands Missile Range (formerly known as White Sands Proving Ground), New Mexico, during all or a part of the period from October

1951 through October 1957, brought this suit to recover compensation allegedly due them as wage board employees under 5 U.S.C. 673, *supra*, p. 2. They claim entitlement to overtime pay for four-hour daily periods during which they were in an off-duty status and without restriction upon their activities other than that which existed by reason of the geographical location of this Army post.[1]

1. White Sands Missile Range is located in a desert region of southern New Mexico. The nearest sizeable towns are Las Cruces and Alamogordo, New Mexico, and El Paso, Texas, which are respectively 28 miles, 52 miles, and 51 miles distant (Pet. App. 4a).

The bus service at White Sands was organized to provide transportation five days a week for civilian employees and military personnel who worked at White Sands but who lived in or near these three towns. Morning bus runs from such towns to the post and afternoon return bus runs were established. These were known as Class "A" runs (Pet. App. 4a, 12a). The operation of these runs required the drivers to work each regular work day from about 6:00 A.M. to 8:00 A.M., and from about 4:00 P.M. to 6:00 P.M., driving the bus and performing other duties directly related to the operation (Pet. App. 4a). The controversy in this case centers around the handling for pay purposes of the period from 8:00 A.M. to 4:00 P.M.

The petition for certiorari prints the opinions in the Court of Claims (Pet. App. 1a-18a), but not that court's findings. We print the findings in the Appendix, *infra*, pp. 1a-53a.

The bus drivers, while at White Sands, were required to perform certain minimal duties not directly involving the transportation of passengers, which included placing gas, oil and water in the bus as needed, washing the bus, checking and greasing it, driving it a short distance to the repair shop for necessary repairs, and "policing" the bus area to remove trash. These duties required on an average only 5 to 6 hours of actual work *per week*. To make provision for the performance of such duties, petitioners' superiors (during the earlier part of the period covered by these claims) designated the morning hours, from 8:00 A.M. to 12:00 Noon of each work day as on-duty time. The time from 12:00 Noon to 4:00 P.M. was considered as off-duty time (Pet. App. 5a–6a).

Sometime in 1952, because of congestion at the single wash rack, this system was changed so that half of the drivers were considered as being on-duty until 12:00 Noon and off-duty from 12:00 Noon until 4:00 P.M., and the other half as being off-duty from 8:00 A.M. to 12:00 Noon and on-duty after 12:00 Noon. Except for certain special situations discussed *infra* (pp. 6–7), and for which the lower court has allowed compensation, each bus driver had a period of approximately four continuous hours each work day, either in the morning or in the afternoon, when he was in an off-duty status (Pet. App. 6a).

The bus drivers were paid on the basis of an 8-hour day and a 40-hour week of working time, which consisted of the two hours in the morning and the two hours in the afternoon involved in making their Class

"A" runs, and another 4-hour period of duty either in the morning or in the afternoon. No compensation was received for the off-duty time that intervened between periods of duty (Pet. App. 7a).

So far as the Army was concerned, the bus drivers were free during their off-duty time to go where they wished and to do what they pleased. However, because of the isolation of the post and the lack of practical means of leaving White Sands (at least during the early part of the period involved in this litigation), the drivers generally remained at the post. The time was usually spent in or near their parked buses, although they went to the cafeteria on the post and to the post exchange whenever they wished to do so. They were also entitled to use the post library and a swimming pool.

About 1956, the Army provided a waiting room with facilities for recreation for use by the bus drivers. After a daytime bus run was established in 1952 between White Sands and Las Cruces, which run arrived in Las Cruces about 9:00 A.M. and left for the return trip about 2:30 P.M., a driver who was off-duty could, and occasionally did, ride this bus to Las Cruces, taking annual leave for the time from 12:00 Noon (when he was on scheduled duty) until his actual return to duty at White Sands (Pet. App. 7a, 15a, fn. 1).

The Court of Claims concluded that since petitioners were free to go where they wished and to do what they pleased, except for the limitations imposed solely by the location of their place of work, the 4-hour off-duty period during which the drivers gen-

erally remained at White Sands was not spent on the post predominantly for the benefit of the Government, and that, therefore, such off-duty time did not constitute "hours of labor" for which petitioners were entitled to overtime compensation (Pet. App. 8a).

At the same time, the court allowed compensation for two special situations. The first of these situations involved the establishment in 1952 of a second type of bus transportation at White Sands, known as Class "B" service. A typical Class "B" run was over a fixed route between two points on the post and involved four round trips per day, each round trip requiring about one hour for completion. During the years 1952–1954, a driver assigned to a Class "B" run made the four scheduled round trips per day in addition to his morning and afternoon Class "A" trips. The Army considered such a driver as being in an off-duty status during the time between the Class "B" runs, and he was compensated only for the eight hours during which he performed actual work for the Government. The court held, however, that the time between such runs represented time spent predominantly for the Government's benefit because it was too short to be used effectively by the driver in activities of his own choice[2] (Pet. App. 12a–14a).

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[2] In 1954, this system of assigning Class "B" runs was changed by dividing these runs between two drivers, one taking the two morning trips, and the other the two afternoon trips. For the remainder of the period involved in this litigation, each driver with an on-post driving assignment during a particular week, as well as a Class "A" assignment, had a period

The other special situation for which the court allowed compensation involved the establishment in 1956 of a mixed Class "A" and Class "B" day-time run between White Sands and El Paso which required four hours for the round trip. The driver to whom this run was assigned for a particular week had one hour off-duty in the morning before commencing this run and three hours off-duty in the afternoon after his return. Here, also, the court below held that the off-duty period in the morning was time spent predominantly for the benefit of the Government and compensable as such (Pet. App. 16a).

Contrary to petitioners' statement (Pet. 7), there is no finding by the court that the drivers were ever "assigned" to work during their off-duty periods without compensation. Nor has it ever been conceded, as petitioners assert, that the drivers were on call or were "actually ordered" to perform various services during their off-duty time. In this respect the court found only that on infrequent occasions the bus master had "asked" a driver who was spending off-duty time at the post to perform some small chore for him such as driving a bus a short distance to the repair shop, and that the amount of time and work involved was "inconsequential" (Finding 24; App. *infra*, pp. 12a–13a). The court also found that the bus master did on occasion switch a driver's four-hour on-duty and off-duty periods for a particular

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of four continuous hours, either in the morning or in the afternoon, when he was off duty and free to do as he wished. As heretofore noted, the court held that such off-duty time did not constitute "hours of labor" (Pet. App. 14a).

day in order to meet an unexpected transportation need, but that such occurrences were infrequent (Finding 23; App. *infra*, p. 12a).

2. As found by the court below, the circumstances relating to petitioner Vick V. Serna are somewhat different from those relating to the other petitioners. Petitioner Serna operated a Class "A" run between Alamogordo and White Sands. In December 1952, he and another bus driver were assigned to assist the bus master in addition to performing their duties as operators of Class "A" runs. It was contemplated by the management that one of these men would assist the bus master from 8:00 A.M. until 12:00 Noon and would then be off-duty from 12:00 Noon until 4:00 P.M., and the other man would be off-duty from 8:00 A.M. until 12:00 Noon and would assist the bus master from 12:00 Noon until 4:00 P.M. This duty consisted of preparing and issuing trip tickets for the other drivers, typing weekly duty rosters, answering the telephone, and relaying the bus master's instructions to the other drivers. These two men were not required to perform the duties normally performed by the bus drivers during their time at White Sands (such as operating Class "B" runs, "policing" the area, etc.). Although not required to do so, petitioner Serna frequently assisted the bus master during his off-duty time. It was mutually understood that he would not be compensated for any assistance rendered during such time. The court held that such work during his off-duty period must be regarded as constituting voluntary services for which

he could not properly claim compensation (Pet. App. 17a–18a).

ARGUMENT

The holdings of the Court of Claims turn upon the particular facts of this case. There is no question of general importance presented, or conflict in decisions. Moreover, the determinations below are clearly correct on this record. Further review by this Court is, therefore, not warranted.

1. The Court of Claims did not hold, as petitioners repeatedly assert (Pet. 8, 9, 11, 13, 15, 17), that scheduled off-duty periods of two hours and less constituted compensable hours of labor, and scheduled off-duty periods of more than two hours did not constitute hours of labor. What the court in fact held was that the four continuous hours of scheduled off-duty time each work day for these bus drivers did not, in the particular circumstances of this case, constitute "hours of labor" compensable under the statute pertaining to federal wage board employees such as petitioners, but that the attendant circumstances of certain other periods designated as "off-duty" time rendered them compensable.

Petitioners' employment is not governed by the provisions of the Fair Labor Standards Act,[3] since the United States is expressly excepted from the definition of an "employer" in Section 3.[4] 29 U.S.C.

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[3] 52 Stat. 1060, 29 U.S.C. 201, *et seq.*

[4] Petitioners, as wage board employees, are also excluded (with certain exceptions not here pertinent) from the coverage of the Federal Employees Pay Act of 1945, Section 102(c), 59 Stat. 296, 5 U.S.C. 902(c).

203(d). For this reason, the Act and its interpretation are not directly involved. Nevertheless, in view of the lack of a statutory definition of "hours of labor", which are compensable for federal wage board employees (5 U.S.C. 673c), the Court of Claims applied here the same test as used by this Court in deciding *Armour & Co.* v. *Wantock*, 323 U.S. 126, and *Skidmore* v. *Swift & Co.*, 323 U.S. 134, under the Fair Labor Standards Act. That test is whether the employee has been "engaged to wait," or whether he only "waited to be engaged." 323 U.S. at 137. Stated otherwise, the question of whether time spent by an employee on an employer's premises, when the nature of the job involves several consecutive hours of idleness, constitutes compensable working time depends upon whether the time is spent "predominantly for the employer's benefit or for the employee's." *Armour & Co.* v. *Wantock*, 323 U.S. at 133. And this is a "a question of fact to be resolved by appropriate findings of the trial court. * * * Each case must stand on its own facts." *Skidmore* v. *Swift & Co.*, 323 U.S. at 136–137, 140.

While purporting to recognize these principles (Pet. 12), petitioners in fact ignore them, for what they contend is that they are entitled, *as a matter of law*, to compensation for all time spent at or near their place of employment by reason of the fact that the geographical location of the site imposed certain restrictions upon their personal activities. Not only has no court ever adopted this view, but this Court expressly pointed out in *Skidmore* (323 U.S. at 136):

> We have not attempted to, and *we can not, lay down a legal formula* to resolve cases so varied

> in their facts as are the many situations in which employment involves waiting time. [Emphasis added.]

Accordingly, this case involves no more than an undertaking by the Court of Claims to apply the general criterion established by this Court to the particular and varying fact situations found by the court to exist in this case. No broad question regarding the meaning of the Fair Labor Standards Act, as envisioned by petitioners, is presented.

2. Moreover, when viewed in the light of its evidentiary findings, the conclusions reached by the Court of Claims were justified. The court found that, so far as the Army was concerned, petitioners were "free to go where they wished and to do what they pleased during their 'off-duty' time"; that they "went to a cafeteria on the post and to the post exchange whenever they wished to do so"; that "they could have gone to the post library or to a swimming pool on the post, but it appears that none of them did"; that, in 1956, "a waiting room, with facilities for recreation, was provided for the drivers by the management"; and that a driver who was off-duty in the morning "could, if he wished to do so," and "occasionally" did ride a daytime bus run between White Sands and Las Cruces, although this involved taking some hours on annual leave because the bus did not return until after the commencement of his afternoon duty time (Pet. App. 7a, 15a, fn. 1; Findings 11(b), 14(b), App., *infra*, pp. 6a–7a, 9a). Thus, petitioners' election generally to remain at White Sands during their off-duty time was not

predominantly for the benefit of the Government.

The fact that the personal activities of the petitioners were in a measure curtailed by the location of their place of employment does not of itself alter this conclusion since petitioners, who lived in the various towns around White Sands, selected this employment well knowing the location of the post, and understanding the split-hours plan of operation under which the transportation system was maintained (Findings 3, 6, App., *infra*, pp. 2a, 3a).[3] And anyone who works is necessarily restricted in his personal pursuits by the need to be at his place of employment when his duty time commences. Cf. *Abbot* v. *United States*, 138 C. Cls. 459, 464.

We do not suggest, of course, that there may not be a situation where all of the facts and circumstances surrounding employment in an isolated location are such that the court could find that during their "off-duty" time the employees were in fact "engaged to wait." Such factors as the imposition of restrictions on an employee's personal activities beyond those contemplated by him when he sought the employment, or the lack of any reasonably adequate recreational or off-time facilities, or the limitation of off-time to a period so short that the employee has no choice but to remain ready for prompt resumption of

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[3] Splitting the daily working hours of federal employees by more than one hour is permitted where a determination is made by proper authority that this is necessary in order to avoid seriously handicapping the organization in carrying out its functions, or incurring substantially increased costs (Pet. App. 9a–12a).

actual work,"[5] might call for a different conclusion from that which is challenged here. Indeed, as heretofore noted (pp. 6–7), the court in this case awarded compensation in those situations where special factors of this nature were found to exist.[6] What we emphasize is, as this Court has previously stated, that there can be no rigid rule requiring that time spent by an employee on his employer's premises, merely by reason of location, should be treated as compensable time.

Since the *Armour* and *Skidmore* rulings, this Court has refused to review a number of decisions dealing with the compensability of time spent on the employer's premises under varying factual situations. *E.g.*, *General Electric Co.* v. *Porter,* 208 F. 2d 805 (C.A. 9), certiorari denied, 347 U.S. 951; *Glenn L. Martin Nebraska Co.* v. *Culkin,* 197 F. 2d 981 (C.A. 8), certiorari denied, 344 U.S. 856; *Bell* v. *Porter,* 159 F. 2d 117 (C.A. 7), certiorari denied, 330 U.S. 813; *Rokey* v. *Day & Zimmermann,* 157 F. 2d 734 (C.A. 8), certiorari denied, 330 U.S. 842; *Armstrong* v. *United States,* C. Cls. No. 145–56, decided January 14, 1959, certiorari denied, 361 U.S. 825; *Wright* v. *United*

[5] This is not a case in which the interval of idleness is so short as to preclude any reasonable inference that the employees could make effective use of the free time. Compare the ruling of the Wage and Hour Administrator under the Fair Labor Standards Act that rest periods of less than 20 minutes must be counted as compensable working time. 29 C.F.R. 785.3(c).

[6] In this connection, *Wright* v. *Carrigg,* 275 F. 2d 448 (C.A. 4), upon which petitioners rely (Pet. 17), can be analogized only to the claims of petitioners in this case which were accepted. The Government is not seeking review of the claims decided adversely to it.

States, C. Cls. No. 232-57, decided January 14, 1959, certiorari denied, 359 U.S. 1001; *Sawyer* v. *United States,* 138 C. Cls. 152, certiorari denied, 355 U.S. 868. There is no more warrant for review in the present case.

3. The denial of compensation to the petitioner Vick V. Serna for time spent during his off-duty hours in assisting the bus master likewise turned upon the particular fact situation. Serna was required to assist the bus master *only* for a four-hour regular duty period either from 8:00 A.M. to 12:00 Noon *or* from 12:00 Noon to 4:00 P.M. If he worked the four hours in the morning, then, so far as the management at White Sands was concerned, he was off duty for the four hours in the afternoon, and vice versa. Another driver was assigned this duty of assisting the bus master during the four-hour period when Serna was to be off duty. Although he was not required to do so, Serna frequently remained at the bus master's office during his off-duty time, and while there answered the telephone and performed other services for the bus master. It was mutually understood between petitioner and his superiors that he would not be compensated for such services during his off-duty time. The Court of Claims has correctly held that, in these circumstances, these were wholly voluntary services for which he is not entitled to overtime pay.

Serna contends (Pet. 18–19) that his performance of such services during his off-duty time was not voluntary, but rather was, in effect, induced or forced by a promise of promotion. But neither the Commissioner who heard the evidence, nor the court, would make a finding of fact to this effect. Equally

without merit is his contention (Pet. 19) that he is entitled to recover compensation for such services under the statutory provision that "[n]o officer or employee of the United States shall accept voluntary service for the United States * * *." 33 Stat. 1257, 31 U.S.C. 665(b). The Court of Claims did not, as Serna asserts (Pet. 20), interpret this statute in its decision in this case. It does not appear that the statute was either cited or relied upon in the court below; nor is there any indication that the court considered it. In any event, as interpreted by the Attorney General, the statute does not apply to services rendered by Government employees, but refers to those rendered by private persons without authority of law.[7] Moreover, it does not follow from the statute's prohibitory language that the United States is legally bound to reimburse a person for services rendered and which are accepted by a government officer or employee in violation of the statute.[8] Whatever rights Serna may have to overtime pay as a federal employee are governed by specific compensation statutes and regulations.[9] We know of no holding which supports petitioner's theory of re-

[7] 30 Ops. A.G. 129, 131 (1913); 30 Ops. A.G. 51, 52 (1913).

[8] On the contrary, the Court of Claims held in *Lee* v. *United States*, 45 C. Cls. 57, that a person cannot recover compensation from the Government for voluntary services, the acceptance of which is prohibited by the statute.

[9] Civilian personnel regulations of the Department of the Army relating to hours of work, as revised March 25, 1952, provided in part, as found by the Court of Claims:

"2–3.b. Commanding officers should delegate authority to specific officials by position to order and approve performance of overtime work * * *. When overtime work is *duly ordered*

covery under this statute (31 U.S.C. 665(b)), and petitioner cites none.

Further, petitioner mistakenly relies (Pet. 19–20) upon Section 3 of the Fair Labor Standards Act, 29 U.S.C. 203(g), where Congress defines the word "employ" as including "to suffer or permit to work." As noted *supra* (p. 9), the provisions of this Act are not applicable to petitioner. Similarly, none of the cases cited by Serna (Pet. 20–21) in support of his right to compensation for these gratuitous services is apposite. *Schaible* v. *United States*, 135 C. Cls. 890, involved customs inspectors who were assigned to overtime duty, and were paid extra compensation therefor, but, through a misinterpretation of a statute by the Bureau of Customs, did not receive the full compensation to which they were entitled. The question in *Anderson* v. *United States*, 136 C. Cls. 365, was whether the overtime services performed by Customs Border Patrol employees were "officially ordered or approved" as required by Section 201 of the Federal Employees Pay Act of 1945, 5 U.S.C. 911, and regulations issued thereunder. The work was required and could not be done by the employees assigned to perform it during their regular 40-hour work week. Finding that the employees were induced to perform

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or approved, and performed, employees may not be denied pay therefor. Conversely, employees cannot obligate the Government for overtime work performed on their own initiative" (App., *infra*, p. 28a). (Emphasis added.)

See also the provisions of these Regulations, as revised November 3, 1954, Sec. 2–3b. (App. *infra*, p. 39a); and provisions of Army Regulations respecting computation of pay, Sec. 3–1. (App. *infra*, p. 46a).

the extra duty by their superiors, including the Commissioner of Customs who had authority to order and approve overtime work, the court held this to be sufficient evidence of approval to require compensation therefor under the terms of the applicable statute. In *Farley* v. *United States*, 131 C. Cls. 776, referred to in *Anderson*, the extra night-time duty which the employee performed was assigned to her; under the order for such assignment she was required to remain on duty during such hours; there was substantial work which it was necessary that she perform during this time; and she agreed as part of her employment to perform the assigned extra duty without compensation.

Petitioner Serna's case does not fit the facts of any of these cases. He was not assigned to the extra duty; he was not required to render overtime assistance to the bus master; it does not appear that anyone with authority to order or approve overtime services ever induced him to render such assistance; and there is no showing that his assistance was necessary during a time when another person was assigned to that duty. His gratuitous services are not compensable. Cf. *Goode* v. *United States*, 25 C. Cls. 261, 267.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1960.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 489–57

(Decided June 8, 1960)

JOSE V. BACA, ET AL.

v.

THE UNITED STATES

FINDINGS OF FACT

General

1. At the request of plaintiffs' counsel, and with the acquiescence of defendant's counsel, the trial was limited under Rule 22(b) to the claims of those plaintiffs who are mentioned in findings 27–35; and the proceedings with respect to all other plaintiffs were held in abeyance. In this connection, counsel for the plaintiffs conceded that if none of the plaintiffs mentioned in findings 27–35 is entitled to recover, none of the other plaintiffs is entitled to recover.

2. During some part of the 6-year period immediately preceding the date (October 18, 1957) of the filing of the petition in this case, each of the plaintiffs was employed by the Department of the Army as a civilian bus driver at a military post which was known during the period in question as the White Sands Proving Ground, but which is now known as the White Sands Missile Range. (For the sake of convenience, this military post will usually be referred to in the findings as "White Sands.") The plaintiffs were civil service employees. Their compensation schedules were fixed by the Army-Air Force Wage Board; and, except for those plaintiffs who were designated as "leaders," the plaintiffs' positions were classified as Wage Board Grade 11.

3. At all pertinent times, it was the intention of the management at White Sands that, as a general rule, the civilian bus drivers should operate on the basis of a split shift, with daily periods of duty being separated by one or more periods of off-duty time. This plan of operation was known to all concerned, although there was no written official pronouncement to that effect by the commander at White Sands earlier than March 28, 1957 (see finding 48).

4. White Sands is located in a desert region of southern New Mexico. The nearest sizable towns are Las Cruces and Alamogordo, New Mexico, and El Paso, Texas. The head-

quarters area at White Sands is approximately 28 miles northeast of Las Cruces, approximately 52 miles southwest of Alamogordo, and approximately 51 miles north of El Paso (over the most direct route).

5. The civilian bus drivers were assigned to the Bus Section, which was one of the five sections comprising the Motor Transport Branch of the Transportation Division at White Sands. The head of the Bus Section was an Army sergeant, who was known as the bus master. The Motor Transport Branch was headed by a commissioned officer of the Army, as was the Transportation Division. The chief of the Transportation Division was responsible to the commander of the post, but reported to the commander through the Logistics Office (G–4) of the headquarters staff.

6. (a) The Bus Section at White Sands was originally organized in order to provide transportation services 5 days per week (Monday through Friday) for civilian employees and military personnel who worked at White Sands but who lived in or near Las Cruces, Alamogordo, or El Paso. Morning bus runs from each of the three towns mentioned to White Sands, and afternoon bus runs from White Sands to the three towns, were established to operate each regular workday. A one-way bus fare of 25 cents was collected from the bus riders. These bus runs were known as "Class A" runs.

(b) At the beginning of the period involved in this litigation, there were approximately 5 morning and afternoon Class A bus runs between El Paso and White Sands, approximately 14 morning and afternoon Class A bus runs between Las Cruces and White Sands, and 1 morning and afternoon Class A bus run between Alamogordo and White Sands. The number of Class A runs was gradually increased, so that, by the end of the period involved in the present litigation, there were at least 14 morning and afternoon Class A bus runs between El Paso and White Sands and at least 24 morning and afternoon Class A bus runs between Las Cruces and White Sands, as well as the morning and afternoon Class A bus run between Alamogordo and White Sands. Also, a morning and afternoon Class A bus run between Hatch, New Mexico, and White Sands, a distance of approximately 62 miles, had been added.

(c) All the Class A bus runs mentioned in this finding were operated by civilian bus drivers.

7. (a) The buses for the Class A runs between Las Cruces and White Sands were kept at night in a parking lot in Las Cruces. Similarly, most of the buses for the Class A runs between El Paso and White Sands were kept at night in a parking lot in El Paso. The bus for the Class A run between Alamogordo and White Sands, the bus for the Class A run between Hatch and White Sands, and some of the buses for Class A runs between El Paso and White Sands were parked at night at the homes of the respective drivers of the buses.

(b) In the morning, when a driver reached his bus at the parking place, it was ordinarily necessary for him to spend from 5 to 10 minutes checking on the operating condition of the bus and warming the engine. As the El Paso drivers were required to depart from their parking places at 6 a.m., they usually had to be at the parking places somewhere between 5:50 and 5:55 a.m. in order to perform the necessary checking and engine warm-up. The Las Cruces drivers, on the other hand, had a shorter distance to travel in going to White Sands (although the traffic was very heavy), and they could arrive at their parking lot at or shortly after 6 a.m. and still perform the necessary checking and engine warm-up before beginning their actual driving operations. Since the buses used on the Alamogordo and Hatch routes were parked at the homes of the respective drivers at night, it is inferred that they could make their respective morning schedules by beginning their checking and engine warm-up operations at 6 a.m.

(c) After leaving the bus parking place in the morning, the operator of a Class A bus run proceeded to one or more designated bus stops in his town for the purpose of picking up his passengers; and, when the passengers were aboard, he drove to White Sands. The customary time of arrival in White Sands was somewhere between 7:30 and 7:45 a.m.

8. After reaching White Sands in the morning and discharging his passengers at a designated place, a bus driver swept out his bus, entered the necessary information concerning the morning trip on the trip ticket for that day, and delivered the trip ticket for the previous day to the bus master's

office. These duties required approximately 15 minutes of the driver's time.

9. From time to time, as indicated below, bus drivers were required while at White Sands to perform other work not directly involving the transportation of passengers:

(a) If a bus needed gasoline, oil, or water, the need was supplied by the driver from facilities provided by the management for that purpose. While the evidence on the point is not entirely clear, it is inferred that a bus driver did not devote more than 1 hour per week to such work, on the average. Ordinarily, gasoline was needed on alternate days.

(b) Ordinarily, it was necessary for the bus drivers to wash their buses once or twice each week. The washing operations required from approximately 45 to approximately 90 minutes of a bus driver's time per week.

(c) Each driver was required to perform a rather thorough weekly check on his bus and to make a report concerning the results of the check. The bus was greased during the course of the checking operation. The whole process required an average of approximately 1 hour per week.

(d) If a bus needed mechanical repairs, the bus driver drove the bus a short distance to the repair shop. Thereafter, the driver was required to go to the repair shop and get the bus at 4 p.m. (or earlier if he preferred and the repairs had been completed) in order that it might be used for his afternoon Class A run. The evidence warrants an inference that this type of work was infrequent and, if averaged out on a weekly basis, required an average of only a few minutes of a bus driver's time per week.

(e) The bus drivers were required to "police" the bus area each day (i.e., pick up empty soft-drink bottles, cigarette butts, and other forms of trash). It appears that the drivers did not devote more than 10 or 15 minutes per day, on the average, to this type of work.

(f) If a bus tire needed fixing, it was the responsibility of the driver to remove the wheel containing the defective tire, put on a spare wheel and tire, and take the defective tire (on its wheel) to the tire repair shop. The evidence warrants an inference that this type of work was infrequent and, if averaged out on a weekly basis, required only a negligible amount of a bus driver's time per week.

10. In order to prepare for the afternoon Class A bus runs from White Sands, the bus drivers were required to go to their buses at 4 p.m. They checked on the operating condition of the buses and, if the buses were not already at the place designated for the loading of passengers (e.g., if a bus was at the repair shop after having been worked on during the course of the day), the drivers drove the buses to the loading place. The bus drivers were required to be with their buses at the designated loading place not later than 4:15 p.m. The passengers boarded the buses between 4:15 and 4:30, and the buses departed from White Sands at 4:30. Those bound for El Paso, Alamogordo, or Hatch reached their destinations in about 1½ hours, while the Las Cruces buses reached their destination in approximately 1 hour. Each bus driver had to spend a few additional minutes in parking and finally checking the bus, and in entering the necessary information concerning the afternoon trip on the trip ticket for the particular day.

11. (a) From the beginning of the period involved in this litigation until sometime in 1952, the time between the bus drivers' arrival at White Sands, after completing their morning Class A runs, and 12 noon each day was considered by the management at White Sands as on-duty time for all drivers. During the course of a workweek (Monday through Friday), the drivers were expected to utilize this on-duty time at White Sands, to the extent that it was needed, for the performance of the duties mentioned in findings 8 and 9.

(b) During the 1951–1952 period mentioned in paragraph (a) of this finding, the time from 12 noon until 4 p.m. each workday was considered by the management at White Sands as off-duty time for the bus drivers; and, in so far as the management was concerned, the bus drivers were free to go where they wished and to do what they pleased during their "off-duty" time. Because of White Sands' isolation, however, and the lack of any practicable means of leaving the post, the bus drivers spent their "off-duty" time at White Sands, waiting for their afternoon duties to begin at 4 p.m. This time was generally spent in or near the parked buses, although the drivers went to a cafeteria on the post and to the post exchange whenever they wished to do so. The drivers

could have gone to the post library or to a swimming pool on the post, but it appears that none of them did.

12. Sometime in 1952, because congestion at the single wash rack occasionally made it difficult for some drivers to wash their buses during morning duty hours, an arrangement was made by the management at White Sands whereby approximately half of the bus drivers were considered by the management as being on-duty until 12 noon and off-duty from 12 noon until 4 p.m., while the remainder of the drivers were considered as being off duty from 8 a.m. (following the completion of the duties referred to in finding 8) until 12 noon, and on duty after 12 noon. Drivers were expected to utilize their on-duty time from 8 a.m. until 12 noon, or from 12 noon until 4 p.m., as the case might be, for the performance of any necessary duties, such as those mentioned in finding 9. Except as indicated in finding 14(b), it continued to be impracticable for bus drivers to leave White Sands during their "off-duty" time, irrespective of whether it was in the morning or in the afternoon.

13. (a) Sometime in 1952—and after the development referred to in finding 12—the management at White Sands began to establish a free type of bus transportation known as "Class B" service. On a Class B bus run, free transportation was provided over a specified route and on the basis of a fixed schedule for military personnel or civilian employees, or both, needing such service in conection with the performance of their official duties.

(b) Class B runs were customarily assigned on a weekly basis to bus drivers who also had morning and afternoon Class A assignments.

(c) A typical Class B bus run was between two or more specified points within the exterior limits of the post and involved four round trips per day, each round trip requiring approximately 1 hour for completion. The first round trip would be made between approximately 8 and 9 o'clock in the morning; the second, between approximately 10:30 and 11:30 in the morning; the third, between 12 noon and approximately 1 o'clock in the afternoon; and the fourth, between approximately 3 and 4 o'clock in the afternoon. During the period 1952–1954, when such a run was assigned to a driver for a

particular week, he was expected to make the four scheduled daily trips, as well as make his morning and afternoon Class A trips and perform at least some duties of the sort mentioned in finding 9 (e.g., procuring gasoline, oil, and water when needed, and performing the weekly checking and greasing operation) between the trips on the Class B run. He was customarily excused from washing his bus and from policing the bus area during a week when operating four daily Class B trips of the sort mentioned in this finding. Any time during the workday at White Sands when such a driver was not driving on his Class B run or performing duties of the sort mentioned in finding 9, he was considered by the management at White Sands as being in an off-duty status. The half-hour free period at about the noon hour was available, and was customarily used by such a driver, for the eating of lunch.

(d) The number of civilian bus drivers at White Sands exceeded the number of Class B runs; and those drivers not assigned to Class B runs during a particular week in the period 1952–1954 were considered by the management at White Sands as being on duty until 12 noon and off duty from 12 noon until 4 p.m., or as being off duty from 8 a.m. until 12 noon and on duty after 12 noon, in accordance with the plans mentioned in findings 11 and 12. Except as indicated in finding 14(b), it continued to be impracticable for bus drivers to leave White Sands during their "off-duty" time, irrespective of whether such "off-duty" time for a driver on a particular day comprised a 4-hour morning or afternoon period or several short periods between trips on a Class B run.

14. (a) Sometime in 1952, a mixed Class B and Class A daytime bus run between White Sands and Las Cruces was established. It was a Class B run in that free transportation was provided for guards working at White Sands, and it was a Class A run in that other civilian or military personnel in an off-duty status could ride the bus by paying the customary 25-cent fare. This run was rotated on a weekly basis among the Las Cruces bus drivers with morning and afternoon Class A assignments. On this run, the driver left White Sands at 8 a.m. (after having completed his morning Class A trip from Las Cruces to White Sands) and arrived in Las Cruces at about 9 a.m. From the time of his arrival

in Las Cruces until 2:30 p.m., the driver was free to go and to do what he pleased, and he was regarded by the management at White Sands as being off duty. At 2:30 p.m., the driver began the return trip to White Sands, and he arrived there at about 3:30 p.m. The period between his midafternoon arrival at White Sands and his departure from White Sands to make his afternoon Class A trip back to Las Cruces was on-duty time.

(b) After the establishment of the mixed Class B and Class A run mentioned in paragraph (a) of this finding, a bus driver who was considered by the management to be off duty in the morning could, if he wished to do so, ride this bus to Las Cruces. Off-duty drivers occasionally went to Las Cruces in this fashion, but it was necessary for such a driver to take annual leave for the period from 12 noon (when his next on-duty period was scheduled to begin) until his actual return to duty at White Sands. Permission had to be obtained in advance from a competent superior for the taking of annual leave, but there apparently was no difficulty in obtaining such permission.

15. (a) There was also a combination Class B and Class A nighttime bus run between White Sands and Las Cruces. The operator of this run did not have a Class A assignment. The first trip on this run was a round trip from White Sands to Las Cruces, and return. It began at about 6 p.m. and ended at about 8 p.m. On the next trip, the driver left White Sands at about 8:15 p.m. and arrived in Las Cruces approximately 1 hour later. He remained in Las Cruces for about an hour, during which time the driver, who customarily lived in Las Cruces, usually went to his home and ate an evening meal. Thereafter, the driver left Las Cruces at about 10:15 p.m. and drove to White Sands, arriving there approximately 1 hour later. The next trip left White Sands at 12:30 a.m. and reached Las Cruces about 1 hour later. The driver was then scheduled to make a final trip from Las Cruces to White Sands, beginning at 1:40 in the morning, if there were passengers in Las Cruces who wished to make the trip and who could not be accommodated in a station wagon which was operated by a military driver and which left Las Cruces for White Sands at about 1:40 a.m. In most instances, the station wagon was able to provide transportation for all who

wished to go from Las Cruces to White Sands at 1:40 a.m., so that the bus driver was free to take the bus to the parking lot shortly after 1:40 a.m. and then go off duty. If, however, it was necessary for the bus driver to make the 1:40 a.m. trip from Las Cruces to White Sands, he ordinarily reached White Sands approximately 1 hour after leaving Las Cruces; and his daily tour of duty then ended at White Sands, in so far as the White Sands management was concerned.

(b) As indicated in paragraph (a) of this finding, the driver of this night run between White Sands and Las Cruces customarily lived in Las Cruces. During the greater part of the period involved in this litigation, the driver was "on his own" in getting from Las Cruces to White Sands prior to beginning his evening driving duties at White Sands, and in returning from White Sands to Las Cruces on the infrequent occasions when the driver ended his official driving duties at White Sands rather than at Las Cruces. Sometime during the period 1955–1957, however, an arrangement was made whereby, as a convenience for the driver of this nighttime bus run between White Sands and Las Cruces, he could pick up an empty bus at Las Cruces in the late afternoon, use it for his own transportation from Las Cruces to White Sands, then use it for the various official trips during the night, and finally use it for his own transportation from White Sands back to Las Cruces in the early morning, if it was necessary for him to make the 1:40 a.m. official trip from Las Cruces to White Sands.

16. Sometime in 1954, the management at White Sands adopted a plan whereby each Class B run of the sort mentioned in finding 13(c) was divided between two drivers. One driver would take the two morning trips, and the other driver would take the two afternoon trips. The driver with the morning Class B assignment during a particular week was regarded by the management as being on duty until 12 noon and off duty from 12 noon until 4 p.m., while the driver with the afternoon Class B assignment was regarded by the management as being off duty from 8 a.m. until 12 noon and on duty after 12 noon. For the remainder of the period involved in the present litigation, each bus driver with an on-post Class B assignment during a particular week, as well as a Class A assignment, had a period of 4 continuous hours

sometime between his morning and afternoon Class A trips that was regarded by the management as an off-duty period.

17. In the fall of 1955, a daytime Class B bus run between White Sands and the Holloman Air Force Base was established. The driver to whom this run was assigned for a particular week would, after making his regular Class A morning run to White Sands, leave White Sands at 8 a.m. and reach Holloman sometime between 9:15 and 9:30. Thereafter, he would leave Holloman for the return trip at about 10:15 or 10:30 and reach White Sands approximately 1¼ or 1½ hours later. The time spent at Holloman by such a driver could be utilized for the purpose of servicing his bus. While assigned to the Holloman Class B run, a bus driver was regarded by the management at White Sands as being off duty from 12 noon until 4 p.m.

18. (a) Sometime during the first half of 1956, a mixed Class B and Class A daytime bus run between White Sands and El Paso was established. The driver to whom this run was assigned for a particular week would, after having made his morning Class A trip to White Sands, leave White Sands at 9 o'clock in the morning for El Paso. Since the most direct route from White Sands to El Paso through the desert was normally closed to traffic at that time, the trip over a longer route would usually take about 2 hours. The driver would customarily get back to White Sands at about 1 p.m. The driver, while holding this assignment, was regarded by the management as being off duty from 8 a.m. until 9 a.m. and from the time of his return to White Sands from El Paso at about 1 p.m. until 4 p.m.

(b) After the establishment of the bus run mentioned in paragraph (a) of this finding, a bus driver with a 4-hour "off-duty" period in the morning could have ridden this bus to and from El Paso, if he had wished to do so. However, he would have had only about 15 minutes in El Paso, and it would have been necessary for him to take annual leave from 12 noon until the arrival of the bus back at White Sands. It is not clear to what extent, if any, off-duty drivers took advantage of this opportunity.

19. About 1956, the management at White Sands provided a waiting room, equipped with such facilities as tables, chairs,

and a soft-drink vending machine, to be used by the bus drivers during their "off-duty" time.

20. When a driver with a Class A assignment was assigned to a Class B run for a particular week, he continued to make the usual morning and afternoon trips on his Class A run during the week.

21. Each week after the establishment of Class B runs at White Sands, there were some bus drivers with Class A assignments who did not have any Class B assignments. Such drivers were regarded by the management as being on duty until 12 noon each workday and off duty from 12 noon until 4 p.m., or as being off duty from 8 a.m. until 12 noon and on duty after 12 noon.

22. At all pertinent times involved in this litigation, bus drivers were at liberty, in so far as the management at White Sands was concerned, to go where they pleased and to do what they pleased during their "off-duty" time. However, a bus driver who found himself at White Sands with a period of "off-duty" time intervening between his morning and afternoon Class A trips was unable, as a practical matter, to leave White Sands, except as indicated in findings 14(b) and 18(b).

23. After the management at White Sands adopted the type of schedule for bus drivers which contemplated that each weekday some of the drivers with Class A assignments would be on duty throughout the morning and off duty from 12 noon to 4 p.m., and that the remainder of such drivers would be off duty from 8 a.m. to 12 noon and on duty after 12 noon, the bus master would sometimes, on short notice, switch a driver's on-duty and "off-duty" periods for a particular day in order to meet some transportation need that unexpectedly arose. Such occurrences were infrequent.

24. During the 6-year period involved in this litigation, there were some occasions when a bus driver spending an "off-duty" period at White Sands would be asked by the bus master to help "police" the bus area, or to drive a bus to the repair shop, or to go to the repair shop and get a bus that had been repaired, or to perform some other chore requiring a few minutes of the bus driver's time. However, the evidence does not show either the specific or approximate dates when services of this sort were performed by bus drivers during

"off-duty" periods. Furthermore, it appears that such instances were infrequent and that the amount of work involved in them was inconsequential.

25. The plaintiffs were compensated by the Department of the Army on the basis of an 8-hour day and a 40-hour week, without any extra pay for overtime, in connection with the plaintiffs' activities that are involved in the present litigation.

26. Prior to the filing of this suit on October 18, 1957, the plaintiffs did not at any time submit to the Department of the Army any claim for overtime compensation with respect to the plaintiffs' activities that are involved in this litigation.

Individual Plaintiffs

27. The plaintiff Jose V. Baca worked as a bus driver at White Sands from February 1, 1955 until September 26, 1957. During that period, he operated a Class A bus run between El Paso and White Sands. Also, from time to time, he had on-post Class B runs, the Class B run between White Sands and Holloman Air Force Base, and the daytime mixed Class B and Class A run between White Sands and El Paso.

28. The plaintiff Verney R. Bunch became a bus driver at White Sands in June of 1952. At first, he operated Class B runs on an 8-hour-day basis. He did not have a Class A run at that time. Later, he was assigned to the mixed Class B and Class A nighttime bus run between White Sands and Las Cruces. While the evidence on the point is not clear, the inference is warranted that the plaintiff Bunch, by December 1955, had been assigned to a Class A bus run between Las Cruces and White Sands; and, presumably, he was thereafter assigned Class B runs on a weekly basis from time to time, in addition to performing his duties as the operator of a Class A run.

29. The plaintiff Floyd D. Campbell became a bus driver at White Sands on September 1, 1953. At all pertinent times thereafter, he operated a Class A bus run between El Paso and White Sands. During the first month of his employment, he also operated an on-post Class B shuttle bus run for 4 continuous hours during the morning of each working day. Then, for a period of about 3 months, he operated

an on-post Class B run of the sort mentioned in finding 13(c), making two morning and two afternoon trips. Beginning in 1954, he was from time to time assigned on a weekly basis to morning or afternoon duty as the operator of various Class B bus runs. The Class B assignments were in addition to his regular Class A assignment.

30. The plaintiff Cecil R. Gillespie was employed as a bus driver at White Sands on January 15, 1956. For approximately 1 month, he did not have a bus run, but spent an 8-hour working day on other duties in the bus area at White Sands. From February 1956 until April or May of 1956, he was assigned to the mixed Class B and Class A nighttime bus run between White Sands and Las Cruces. Then, for a period of 10 or 11 months, he worked an 8-hour day at White Sands as an extra driver, not assigned to a regular run. In March of 1957, he was assigned to a Class A bus run between El Paso and White Sands. Presumably, he was thereafter given at least an occasional weekly assignment to morning or afternoon duty as the operator of a Class B bus run, in addition to performing his work on the Class A run.

31. The plaintiff Werttie L. Haney, after having had a period of previous employment as a bus driver at White Sands, resumed such employment on August 27, 1953. From that date until sometime around the middle of 1955, he was assigned to the mixed Class B and Class A nighttime bus run between White Sands and Las Cruces. For a part of this period, however, he operated the nighttime bus run only 3 days per week, and spent the other 2 days of the week operating a daytime bus run on an 8-hour-day basis. About the middle of 1955, he was assigned to a Class A bus run between El Paso and White Sands. Thereafter, in addition to performing his duties as the operator of a Class A bus run, he was given weekly assignments from time to time to operate Class B bus runs in the morning or in the afternoon.

32. The plaintiff J. E. Jones went to work at White Sands as a bus driver on July 31, 1955. He was assigned to a Class A bus run between El Paso and White Sands. After working for 6 or 8 months, he was assigned on a weekly basis to morning or afternoon Class B bus runs from time to time, in addition to performing his duties as the operator of a Class A run. Among the Class B runs that he had was the daytime

mixed Class B and Class A bus run between White Sands and El Paso.

33. The plaintiff Rodolpho Martinez went to work at White Sands as a bus driver in August of 1953 and worked until January of 1957. He was assigned to a Class A bus run between El Paso and White Sands. From time to time, in addition to his work as the operator of a Class A bus run, he received weekly assignments to on-post Class B bus runs. Some of these Class B runs during 1953–1954 required the making of two morning and two afternoon trips, as indicated in finding 13(c). He also at times had the Class B run between White Sands and the Holloman Air Force Base.

34. The plaintiff Vick V. Serna, after having had a period of previous employment as a bus driver at White Sands, resumed such employment on October 13, 1952. He was assigned to operate a Class A bus run between Alamogordo and White Sands. In December of 1952, he and another bus driver, in addition to performing their duties as operators of Class A bus runs, were informally assigned to assist the bus master. It was contemplated by the management at White Sands that one of these men would assist the bus master from 8 a.m. until 12 noon, and would then be off duty from 12 noon until 4 p.m.; and it was contemplated that the other man would be off duty from 8 a.m. until 12 noon, and would then assist the bus master from 12 noon until 4 p.m. The assistance consisted of preparing and issuing trip tickets to other drivers, typing duty rosters, answering the telephone, and relaying the bus master's instructions to other drivers. The plaintiff Serna, after becoming an assistant to the bus master, continued to operate the morning and afternoon Class A bus trips between Alamogordo and White Sands, but he was not required to operate Class B bus runs or to perform other duties of the sort referred to in finding 9. The plaintiff Serna was formally designated as a "section leader" in February 1956. His duties in that position were approximately the same as they had formerly been in his role as an assistant to the bus master. Although not required to do so, the plaintiff Serna, with the knowledge and acquiescence of the bus master, frequently rendered assistance to the bus master of the sort previously mentioned during his "off-duty" time. The management at White Sands and the plaintiff

Serna mutually understood, at the time when such services were performed during his "off-duty" periods, that he would not be compensated for those services.

35. The plaintiff James M. Simpson started to work at White Sands as a bus driver on September 2, 1952. He was assigned to a Class A bus run between Las Cruces and White Sands. From time to time, in addition to performing his duties as the operator of a Class A bus run, he was given weekly assignments to operate Class B bus runs. During the period 1952–1954, several of these Class B bus runs thus assigned to him required the making of two morning and two afternoon trips per day, as indicated in finding 13(c).

Department of the Army Regulations

36. At the beginning of the period of time involved in the present litigation, and until March 25, 1952, the Civilian Personnel Regulations of the Department of the Army relating to the subject of hours of work provided in part as follows:

Section 1

General Provisions

SCOPE

1–1. These regulations are applicable to all employees of the Department within the United States, regardless of the legal basis for computing their pay. * * *

COVERAGE

1–2. This regulation is concerned with administrative authority to establish or change hours of duty of Department of the Army employees.

* * * * * *

DEFINITIONS

1–4. a. **Administrative workweek.**—The days and number of hours of work per week which employees are regularly required to perform; when used with reference to full-time officers and employees subject to the Civil Service Commission's overtime pay regulations, the administrative workweek established pursuant to section 301(b) of those regulations. (The requirements of section 301(b) are described in par. 2–10.)

b. **Basic workweek.**—The period within an administrative workweek for which an employee is regularly paid at straight-time rates; when used with reference to full-time officers and employees subject to the Civil Service Commission's overtime pay regulations, the forty-hour workweek established pursuant to section 301(a) of those regulations. (The requirements of section 301(a) are described in par. 2–9.)

c. **Regularly scheduled administrative workweek.**—The portion of each week which is fixed in advance as the period during which an employee is regularly required to be on duty; when used with reference to full-time officers and employees subject to the Civil Service Commission's overtime pay regulations, the administrative workweek established pursuant to section 301(b) of those regulations. (The requirements of section 301(b) are described on [sic] in par. 2–10.)

d. **Irregular or occasional overtime.**—A period during which an employee actually works but which is not included within his regularly scheduled administrative workweek; when used with reference to officers and employees subject to the Civil Service Commission's overtime pay regulations, hours of employment in excess of the regularly scheduled administrative workweek.

e. **Regularly scheduled tour of duty.**—The hours and days, fixed in advance, during which an employee is regularly required to be on duty; when used with reference to full-time officers and employees subject to the Civil Service Commission's overtime pay regulations, the administrative workweek established pursuant to section 301(b) of those regulations. (The requirements of section 301(b) are described in par. 2–10.)

* * * * *

Section 2

Establishment of Workweeks

ESTABLISHMENT OF BASIC AND ADMINISTRATIVE WORKWEEKS

* * * * *

2–2. **Length of basic workweek.**—The basic workweek for employees in the several trades and occupations whose compensation is set by wage boards or other wage fixing authorities is fixed at not more than 40 hours by section 23 of the act of March 28, 1934 (5 U.S.C. 673c), as extended by section 203 of the Federal Employees Pay Act of 1945 (Public Law 106, 79th Cong.). All addi-

tional hours of officially ordered or approved duty within the administrative workweek are to be treated as overtime.

* * * * *

POLICY

2-4. The Department's policy concerning the establishment of hours of work is given in Orders "B", 16 December 1947, subject, Hours of Work. The order is quoted—

1. The Federal Employees Pay Act of 1945 requires the establishment of a basic work week of 40 hours, with the hours of work to cover a period of not more than 6 of any 7 consecutive days. After passage of this Act, the President in a memorandum to the Heads of the Departments and Agencies dated August 23, 1945, requested that there be established wherever practicable a normal forty-hour work schedule of five days, eight hours per day. Pursuant to this policy a basic forty-hour work week will be maintained in the Department of the Army, with the forty hours of regularly scheduled work confined, insofar as possible, to the period of Monday through Friday, inclusive.

2. Where *operating conditions* make such action *absolutely necessary* the forty-hour tour may be scheduled over fewer than five days or over not more than six days in a period of seven consecutive days. Authority to so schedule work weeks is hereby delegated to the Chief of Staff, the Commanding General, Army Ground Forces, the commanding generals of armies (ZI) and Military District of Washington, the chiefs of administrative and technical services, and the commanding generals of the oversea commands or their designated representatives, for redelegation to the lowest practicable echelon.

3. Wherever required by essential operations, additional overtime hours may be scheduled on either a regular or intermittent basis. Authority for requiring such overtime work is hereby delegated to the officers listed in paragraph 2 above or their designated representatives for redelegation to the lowest practicable echelon. Controls over overtime work may be established for field installations by appropriate command headquarters and for the departmental service by the Office, Secretary of the Army. Prior to establishment of any overtime tour on a regularly scheduled basis consideration should be given to use of skeleton staffs.

4. The tours of duty of employees, such as firefighters, required to remain at or within the confines of their posts

of duty for more than forty hours per week but which do not require that all of their time be devoted to actual work will be established in accordance with applicable regulations.

* * * * *

The authority to fix or change the basic 40-hour tour of duty (the five 8-hour days in the administrative workweek) is the responsibility of the commanding officer of the installation. It is to be noted that the 40-hour basic tour must be scheduled for each administrative workweek in order that the employee may be considered as a full time employee for leave accrual purposes.

* * * * *

2-6. **Employee coverage.**—The overtime pay regulations promulgated by the Civil Service Commission under the Federal Employees Pay Act of 1945, and approved by the President in Executive Order 9578 of June 30, 1945, apply to all civilian officers and employees in or under the executive branch of the United States Government, including Government-owned and controlled corporations, except those listed below:

* * * * *

'd. Employees whose basic compensation is fixed and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose:

* * * * *

2-7. **Workweeks to be established.**—Heads of agencies must establish for all full-time empoyees subject to the Commission's overtime pay regulations:

a. A regularly scheduled basic workweek of 40 hours;

b. A regularly scheduled administrative workweek, consisting of the 40-hour basic workweek plus such period of overtime as will regularly be required of each group of employees.

2-8. **Method of establishing workweeks.**—The basic and administrative workweeks must be established by general public regulation.

2-9. **Identification of basic workweek.**—a. The regulation establishing the basic workweek must specify the names of the calendar days, and the number of hours of employment for each of these days, which are included in the basic workweek. However, the Comptroller General has ruled that it will be regarded as sufficient if the head of the agency, by administrative order, prescribes the general pattern for the basic workweek for

the guidance of field officers. These officers would then follow this general pattern in prescribing daily tours of duty as the needs of the service may require (25 Comp. Gen. 151, August 7, 1945). (This was accomplished by Orders "B", 16 December 1947. See paragraph 2-4.)

b. Whenever it is impracticable to prescribe a regular schedule of definite hours of duty for each workday of a regularly scheduled workweek, the first 40 hours of duty performed within a period of not more than 6 days of the administrative workweek may be established as the basic workweek; and all additional hours of officially ordered or approved duty within the administrative workweek should be treated as overtime (25 Comp. Gen. 14, July 5, 1945).

c. The basic workweek may not extend over more than six of any seven consecutive days. In a memorandum to the heads of departments and agencies on June 30, 1945, the President indicated his desire that whenever practicable, the basic workweek be spread out over the first five days of the administrative workweek—whenever possible, on Monday through Friday.

2-10. **Identification of administrative workweek.**—a. The regulation establishing the regularly scheduled administrative workweek must identify, by names of calendar days and by number of hours per day, the periods of time included in the regularly scheduled administrative workweek which are in addition to the basic workweek.

b. Unlike the basic workweek, the administrative workweek is not limited to six of any seven consecutive days (25 Comp. Gen. 121, July 28, 1945). The President has indicated, in a memorandum to the heads of departments and agencies on June 30, 1945, his desire that any hours in excess of 40, in a regularly scheduled administrative workweek, be scheduled for the sixth day of that week—whenever possible, for Saturday.

c. The head of the agency may wish to prescribe specific hours in the regulation, or to state the agency's policy toward night work. For work between 6 p.m. and 6 a.m., night differential is payable under the conditions described in CPR P-1 "Night Differentials."

* * * * *

2-12. Tours containing regularly scheduled overtime are allowed, but will be kept to an absolute minimum.

(1) Before approving an overtime schedule, every effort should be made to eliminate the necessity for such overtime through assignment of personnel from activities in which the work load has decreased, recruitment

of additional personnel within prescribed personnel authorizations, or through rescheduling of hours of work.

(2) Actual operating needs will be the basis for overtime tours.

(3) Overtime tours should be approved for as short a period as possible and renewed only if absolutely necessary.

(4) Skeleton staffs will be used wherever possible in lieu of complete staffs. (A "skeleton staff" may include as many as half of the personnel in a given activity.)

(5) Occasional overtime may be authorized in accordance with section 5.

(6) Where 6 or 7 days coverage is required, it is suggested that the nonwork days be staggered.

* * * * * *

2-17. So far as the Department of the Army is concerned, the term "on-call employees" will be restricted to firefighters who are assigned to an on-call tour, as described in the following paragraph. If any installation has an employee(s) (other than firefighters) who is believed to be on call, or for whom an on-call tour is believed justified, that installation should submit a complete report of the proposed tour through channels to the Civilian Personnel Division, Office of the Secretary of the Army. The report should contain information concerning the classification, grade, and salary of the employee, the duties and responsibilities, the tour desired, and an explanation of why an on-call tour is considered desirable and necessary. Wherever possible, these "problem situations" should be resolved on a normal basis, rather than on an on-call basis. The Civilian Personnel Division, Office of the Secretary of the Army, will retain sole authority for approving these exceptions.

Section 3

Establishment of Hours for Opening and Closing Offices

* * * * *

NOTICE FOR WORKING HOURS

3-2. Hours of duty for individual employees should be scheduled in advance and as much notice as possible should be given concerning the working hours. Arbitrary changes in starting time and frequent fluctuations from day work to night work should be avoided. Where

changes from day shifts to night shifts are necessary, it is generally desirable that employees remain on one shift a minimum of 2 weeks—4 weeks is even more desirable.

SPECIAL CONSIDERATIONS IN FIXING TOURS OF DUTY

* * * * *

[3–3.] b. The fixing of hours of work for Federal employees, subject to the requirements of applicable laws and regulations, is the responsibility of the administrative office. The jurisdiction of the Comptroller General with respect thereto extends only to a determination that expenditures for salary or wages are authorized under the law (17 Comp. Gen. 3, July 3, 1937; 21 Comp. Gen. 965, April 30, 1942).

* * * * *

Section 5

Night Shifts and Irregular or Occasional Overtime or Holiday Work

* * * * *

REQUIRING OCCASIONAL OVERTIME OR HOLIDAY WORK

Overtime

5–3. **Authority to require overtime.**—Heads of agencies may delegate to any officer or employee authority to order or approve overtime in excess of the administrative workweek by employees subject to the Commission's overtime pay regulations. No overtime in excess of the administrative workweek shall be ordered or approved except in writing by an officer or employee to whom such authority has been specifically delegated by the head of the agency. This authority was delegated by the Secretary of the Army in paragraph 2, Orders "B", 16 December 1947. See paragraph 2–4 of this regulation.

* * * * *

WORK IN EXCESS OF 8 HOURS PER DAY DURING EXTRAORDINARY EMERGENCY: HOW COMPENSATED

5–12. Work performed by laborers and mechanics in excess of 8 hours per day during an extraordinary emergency will be compensated for at overtime rates only if it is also in excess of 40 hours worked or in a leave with pay status in the unit week.

GRANTING COMPENSATORY TIME OFF

* * * * *

[5–13.] b. Compensatory time off in lieu of paid overtime may be granted to all employees, graded or ungraded, paid on a per annum basis, except those whose per annum rates are fixed by the War Department Wage Coordination Board, or by other wage fixing authorities setting wages as a result of a wage survey. It should be particularly noted that per-hour employees whose rates are set on an hourly, daily, or piecework basis, are not eligible for compensatory time off.

* * * * *

OFFICIAL TIME REPORTS

5–14. All overtime work in excess of the regularly scheduled tour of duty (including regularly scheduled overtime, if any) must be ordered or approved by an officer or employee to whom authority has been specifically delegated. * * * Commands may establish such controls over extra overtime work as they consider necessary, including the requirement for a separate approval in writing. Where such controls are not established, the official time report will be sufficient to prove that all time thereon was officially ordered or approved, provided it is signed or initialed by an individual to whom there has been delegated the authority to order or approve extra overtime. Irregular or occasional time worked in excess of 40 hours in the unit week must be certified on the official time report.

37. As of March 25, 1952, the Civilian Personnel Regulations of the Department of the Army relating to the subject of hours of work were revised so as to read in part as follows:

Section 1

General Provisions

SCOPE AND COVERAGE

* * * * *

[1–1.] b. These regulations provide the requirements for fixing tours of duty for all employees of the Army Establishment, wherever located, regardless of their tenure of employment and legal basis for computing their pay. * * *

* * * * *

RESPONSIBILITIES

Delegation of Authority

1–3. a. Section 12, act 2 August 1946 (5 U.S.C. 22a) permits the delegation of authority to take final action on the employment, direction, and general administration of personnel, including the authority to fix the hours of work for employees, subject to applicable laws and regulations prescribed by the Department of the Army. The requirements imposed by the statutes cited in paragraph 1–2, as well as the policy of the Department of the Army with respect to hours of work for its civilian employees, are set forth in DA Orders B, 16 December 1947, the pertinent portion of which is quoted below. Paragraph 2, DA Orders B, delegates authority to the armies, commands, and services for redelegation to the lowest practicable echelon. The responsibility for establishing and changing the hours of work for employees of the Army Establishment, subject to the requirements of applicable laws and the provisions of these regulations, is therefore the responsibility of each commanding officer employing civilian personnel. The pertinent portion of DA Orders B is as follows:

1. The Federal Employees Pay Act of 1945 requires the establishment of a basic workweek of 40 hours, with the hours of work to cover a period of not more than six of any seven consecutive days. After passage of this Act, the President in a memorandum to the Heads of the Departments and Agencies, dated August 23, 1945, requested that there be established wherever practicable a normal 40-hour work schedule of 5 days, 8 hours per day. Pursuant to this policy a basic 40-hour workweek will be maintained in the Department of the Army, with the 40-hours of regularly scheduled work confined, so far as possible, to the period of Monday through Friday, inclusive.

2. Where *operating conditions* make such action *absolutely necessary* the 40 hour tour may be scheduled over fewer than 5 days or over not more than 6 days in a period of seven consecutive days. Authority to so schedule workweeks is hereby delegated to the Chief of Staff, the commanding generals of armies (ZI), and Military District of Washington, the chiefs of administrative and technical services, and the commanding generals of the oversea commands or their designated representatives, for redelegation to the lowest practicable echelon.

3. Whenever required by essential operations, additional overtime hours may be scheduled on either a regu-

lar or intermittent basis. Authority for requiring such overtime work is hereby delegated to the officers listed in paragraph 2 or their designated representatives for redelegation to the lowest practicable echelon. Controls over overtime work may be established for field installations by appropriate command headquarters and for the departmental service by the Office, Secretary of the Army. Prior to establishment of any overtime tour on a regularly scheduled basis consideration should be given to use of skeleton staffs.

4. The tours of duty of employees, such as fire fighters, required to remain at or within the confines of their posts of duty for more than 40 hours per week but which do not require that all of their time be devoted to actual work, will be established in accordance with applicable regulations.

Comptroller General

b. The jurisdiction of the Comptroller General with respect to hours of work extends only to a determination that expenditures for salary or wages are authorized under the law. *17 Comp. Gen. 3; 21 id 965.*

DEFINITIONS

Administrative Workweek

1-4. a. An administrative workweek is a period of seven consecutive calendar days, used as a unit in computing pay. Generally, the administrative workweek is identical to the calendar week, beginning at 0001 hours on Sunday and ending at 2400 hours the following Saturday. The administrative workweek consists of the regularly scheduled tour of duty, as defined below, and the regular day(s) off. In the case of on-call employees (sec. 3), the administrative workweek normally will be established to begin and end on the hour of a day when shifts change. In such cases, except for purposes of computing holiday pay, the calendar day also will be considered as beginning and ending at the time the 24-hour shifts change.

Tour of Duty

b. Tour of duty refers to the hours of the day, and the days within an administrative workweek, *fixed in advance*, during which the employee is required to perform service on a regular, repetitive basis. As used in these regulations, an employee's tour of duty consists of

his basic tour of duty and any overtime work that is scheduled to be performed on a regular, repetitive basis.

Basic Tour of Duty

c. The basic tour of duty is the 40-hour workweek, established pursuant to the statutes cited in paragraph 1-2. Service during the basic tour of duty is compensated for at straight time rates as prescribed in CPR P11. Generally, the basic tour of duty will consist of five 8-hour days, Monday through Friday of each administrative workweek. For on-call employees, the basic tour of duty consists of 60 basic hours; generally, two 24-hour periods and one 12-hour period during each administrative workweek.

Irregular Tour of Duty

d. An irregular tour of duty is a basic tour of duty established as the first 40 hours of service within an administrative workweek. Such hours are reserved to those work situations where it is impossible to schedule specific days and/or hours of duty in advance, although it is known that at least 40 hours of service normally will be required within each administrative workweek. Such situations will arise primarily in connection with inspection activities where need for an inspector's services is conditioned by factors beyond the Department's control (such as weather conditions or a contractor's production schedule).

On-Call Tour of Duty

e. A basic tour of duty involving regularly scheduled stand-by time is defined as an on-call tour of duty; that is, where the employee is not required to devote all his time in actually performing service, but nevertheless is required to remain at or within the confines of his post of duty to perform service when called or when the need arises. See section 3 for definition of other compensable stand-by time.

Part Time Tour of Duty

f. A part time tour of duty is a scheduled tour of less than 40 hours which requires service on a regular repetitive basis on one or more days of each administrative workweek.

Regularly Scheduled Overtime

g. Regularly scheduled overtime refers to the periods in the administrative workweek, in excess of the basic tour of duty, during which the employee is required to perform service on a regular, repetitive basis.

Irregular or Occasional Overtime

h. Irregular or occasional overtime is authorized service performed at infrequent intervals which is in excess of the hours established for the regularly scheduled tour of duty as defined above.

* * * * *

Section 2

Establishing Tours of Duty

GENERAL PROVISIONS

* * * * *

Notice of Working Hours

[2–1.] a. All tours of duty will be established in advance and published by memorandum or other administrative order of the installation. Although work schedules generally will be established on an installation-wide basis, they must nevertheless be recognized as personal to each employee for the purpose of accruing leave benefits in accordance with the Annual and Sick Leave Act of 1951, reporting attendance and absence from duty, as well as establishing the time unit on which his pay is computed. Notices will be posted in conspicuous places, readily accessible to all employees affected by the notice. Schedules for individual employees, or an excepted group of employees, also will be in writing, with appropriate distribution.

Changes in Working Hours

b. Changes in established work schedules will be made in writing, with as much advance notice to employees as possible. Arbitrary changes in starting time and frequent fluctuations from day to night shifts will be avoided. Where changes from day shifts to night shifts are necessary, it is generally desirable for employees to remain on one shift a minimum period of at least 2 weeks (a period corresponding to the established pay period).

A period of at least 4 weeks (two pay periods) is even more desirable.

* * * * *

OVERTIME HOURS

2–3. a. Overtime services of civilian employees, except as necessitated because of disaster or emergency, may be utilized only to meet essential deadlines or to maintain absolutely essential operations. When so utilized it will be restricted to the absolute minimum required for the accomplishment of the project. Hours of work may be increased either as an extension of the regularly scheduled workweek or on an intermittent overtime basis. Commanding officers will install appropriate controls to assure that all authorized overtime conforms to the above policy.

b. Commanding officers should delegate authority to specific officials by position to order and approve performance of overtime work (see par. 3, DA Orders B, quoted in par. 1–3). When overtime work is duly ordered or approved, and performed, employees may not be denied pay therefor. Conversely, employees cannot obligate the Government for overtime work performed on their own initiative.

c. When tours of duty are established to include regularly scheduled overtime, the following principles should be observed:

(1) The use of regularly scheduled overtime periods will be kept to an absolute minimum, and limited to those activities of an installation where the need therefor is established. In all cases, actual operating needs will be the basis for such schedules.

(2) Except under extraordinary circumstances, regularly scheduled overtime hours will not be directed in excess of 48 hours each week.

(3) Before approving an overtime schedule, every effort should be made to eliminate the necessity for the overtime work through assignment of personnel from activities in which the workload has decreased, through recruitment of additional personnel within prescribed personnel authorizations, or through rescheduling the hours of work.

(4) Regularly scheduled overtime tours should be approved for as short a period as possible, and renewed only if absolutely necessary.

(5) Nonwork days should be staggered when it is necessary to provide six- or seven-day *coverage* for a

particular activity. See paragraph 2-2a for instructions regarding regular days off.

(6) The overtime hours should be scheduled on Saturday, if possible.

* * * * *

Section 3

Hours of Work Involving Stand-by Time

* * * * *

DETERMINING STATUS OF STAND-BY TIME

3-2. The determination of whether a given period is stand-by time for which compensation is allowed depends upon the conditions and circumstances of the employment. The mere fact that an employee is available to perform service or is available to receive a call is not sufficient. His whereabouts and his freedom of choice to follow his normal living habits, and to engage in personal activities at places of his own choosing, must be limited by the conditions of his employment (rather than geographical location), for the benefit of the Government.

Restriction Because of Geographical Location

a. An employee's acceptance of the duties to be performed in a given position carries with it a responsibility on his part to limit his off-duty activities to the extent that he is available for duty on his next workday. There are certain employments, however, which require a narrower limitation of an employee's off-duty time because of the geographical location of the work site and/or the nature of the duties to be performed. This is particularly true of caretakers, locktenders, and similar personnel who live on the premises, and other workers such as surveyors and members of field groups whose duties are at isolated locations, and who may live continuously in camps and have, in effect, combined living and duty stations. Such limitations are of natural origin, are not the result of employment conditions within the control of the Army Establishment, and are not deliberately required by the Army Establishment for the benefit of the Government. In such cases, an employee's off-duty time is not compensable stand-by time, even though he may be required to remain at his work site, and is available to perform service whenever the need arises. Actual serv-

ice required during any normal off-duty period would be considered compensable time.

Restriction of Employee's Freedom

b. No hard and fast rule can be stated which will cover all cases wherein an employee's freedom is restricted to the extent that stand-by time may be considered duty time for which compensation is payable. The following examples illustrate the extent to which the Army Establishment recognizes stand-by time as duty time for pay purposes:

(1) A firefighter in the Army Establishment is employed on a schedule of 24 hours on duty and 24 hours off duty. During his off-duty period he is not required to remain at his post of duty, but is free to engage in personal activities of his own choosing. During his on-duty period, he is required to remain at the fire station and respond immediately to all calls, day or night. Eating and sleeping facilities are provided at the station. Although he is not required to perform actual service during the entire 24-hour on-duty period (as much as 8 hours being allowed for sleeping and eating), his normal living habits are nevertheless restricted by administrative regulation of the Army Establishment for the benefit of the Government, and compensation is allowed for the stand-by time. The on-duty periods of such a schedule represent regularly scheduled stand-by time, and is the normal "on-call" tour of duty in the Army Establishment (par. 3–3).

(2) A civilian doctor, employed in an Army hospital on a regular tour of duty of five 8-hour days, Monday through Friday, is required to stand by for emergency work a certain number of nights each month. This stand-by time is spent in the hospital where he is required to remain on-call at all times. Eating and sleeping facilities are provided at the hospital. Since the doctor's freedom is narrowly limited by administrative regulation of the hospital, the stand-by time spent "at or within the confines of his post of duty" is considered duty time for which compensation is allowed. Such service is referred to as "on-call overtime," as provided in paragraph 3–4.

(3) A civilian doctor is employed on a regular tour of duty of five 8-hour days, Monday through Friday. He is required to stand by for emergencies, on a rotating schedule, one night during a 3-week cycle. He resides on the installation in quarters provided by the Government. During the stand-by time, however, he is not re-

quired to remain at his post of duty (as distinguished from his place of residence). The stand-by time may be spent as the doctor chooses, except that he is required to leave word at his post of duty where he can be reached at any time. Since his freedom is not restricted to any great extent, the stand-by time is not service "at or within the confines of his post of duty" and, as such, is not compensable duty time. Service performed in response to an emergency call, however, is compensable as prescribed in CPR P11.

ON-CALL TOURS OF DUTY

3–3. a. Work schedules in which the basic tours of duty are comprised solely of regularly scheduled stand-by time are identified as on-call tours of duty. Employees assigned such schedules are classified as on-call employees. (Employees who are assigned regular tours of duty of 40 basic hours each week and who perform on-call overtime, as provided in paragraph 3–4, are not identified with this group.) The following factors must be present in all cases for the establishment of an on-call tour of duty:

(1) The character of the duties to be performed must be such that the need therefor is unpredictable, such as fires or emergency calls for medical services.

(2) The entire time must be spent at the employee's post of duty (as contrasted to his place of residence).

(3) Eating and sleeping facilities must be provided at the post of duty.

(4) The established tour of duty must prescribe a definite number of stand-by hours on duty followed by a definite number of hours off duty. A minimum of 60 stand-by hours (the basic tour of duty) during each administrative workweek is required. Where a regularly scheduled overtime period is required, the tour of duty may not exceed a maximum of 72 hours, consisting of 60 basic hours and 12 overtime hours. For pay computation purposes, each hour of the on-call tour of duty is applied on a two-thirds basis; that is, compensation is computed at two-thirds of the appropriate rate(s) of pay. The time allowed for sleeping and eating (normally, 8 hours during each 24-hour period) need not be identified for pay purposes. See CPR P11.4.

* * * * *

Restriction on Use

c. On-call tours of duty may be established for the following classes of personnel who are designated "on-

call" employees for pay computation and leave accrual purposes (CPR L1 and CPR P11):

(1) *Firefighters.*—This term may include fire chiefs, assistant fire chiefs, fire prevention inspectors, and other similar fire protection personnel when their services can be more effectively utilized on an on-call basis. See SR 320-510-1.

(2) *Guards and other maintenance-protective, custodial personnel, etc.*—Guards and other maintenance-protective, custodial personnel, and particularly those employed at stand-by installations, when it is desired that all services consist of *regularly scheduled stand-by time subject to prior approval* in accordance with paragraph 3-5.

(3) *Civilian doctors, nurses, and other personnel employed in hospitals and dispensaries.*—Civilian doctors, nurses, and other personnel employed in hospitals and dispensaries, when all services of such personnel consist of *regularly scheduled stand-by time*, and can be more effectively utilized on this basis. Prior approval is required in accordance with paragraph 3-5.

(4) *Other employees.*—Any other employee, or group of employees, designated on-call, subject to the approval requirements of paragraph 3-5.

ON-CALL OVERTIME

Requirements

3-4. a. On-call overtime, as used herein, represents additional hours that *regular* full time employees (excluding on-call employees as defined in par. 3-3) may be required to spend at a work site, outside their regularly scheduled tour of duty, as illustrated in paragraph 3-2b(2). In order to consider such additional hours as compensable overtime hours, the following requirements must be observed:

(1) The stand-by service will be performed in rotating shift systems by employees working regularly scheduled tours of duty of 40 basic hours during each administrative workweek.

(2) The stand-by time will be limited to situations requiring a *minimum* of 16 consecutive hours of coverage, in addition to the employee's regular daily tour. The stand-by time must be spent at the employee's post of duty (as contrasted to his place of residence).

(3) Eating and sleeping facilities must be provided at the post of duty.

(4) For pay computation purposes, each hour of the occasional stand-by time will be applied on a one-half

basis; that is, compensation will be computed at one-half of the employee's overtime rate of pay for his regular position. The time allowed for sleeping and eating (normally 8 hours during each on-call period) need not be identified for pay purposes. Such stand-by hours do not represent a part of the employee's basic tour of duty for leave purposes.

Restriction on Use

b. The use of occasional on-call overtime, as provided above, is restricted to doctors and nurses, unless prior approval for other classes is obtained in accordance with paragraph 3–5. Employees assigned basic on-call tours of duty, as provided in paragraph 3–3, are not eligible for compensation for on-call overtime.

APPROVAL REQUIREMENTS

General

3–5. a. It is the desire of the Department of the Army that work schedules involving stand-by time, other than those provided for above, be resolved on a normal basis wherever possible. Where up to 24-hour coverage is required, the possibility of establishing regular tours of duty on a rotating shift basis should be considered with personnel assigned to the shifts in accordance with the service required. The possibility of providing adequate coverage by requesting employees to advise of their location for receiving possible emergency calls (par. 3–2b(3)) also should be considered. Installation commanders may establish on-call tours for firefighters, and tours including on-call overtime for doctors and nurses in accordance with paragraphs 3–3 and 3–4. Prior approval of the Civilian Personnel Division, Office, Secretary of the Army, will be obtained before on-call status is established as compensable time for any other class of employees.

38. (a) In December 1952, subparagraph "a" of paragraph 1–4 of section 1 of the Civilian Personnel Regulations of the Department of the Army relating to the subject of hours of work was revised to read as follows:

a. An administrative workweek is a period of seven consecutive calendar days, used as a unit in computing pay. Generally, the administrative workweek is identical to the calendar week, beginning at 0001 hours on Sunday and ending at 2400 hours the following Satur-

day. In case of on-call employees (section 3), the administrative workweek normally will be established to begin and end on the hour of a day when shifts change. The administrative workweek consists of the regularly scheduled tour of duty, as defined below, and the regular day(s) off.

(b) In December 1952, subparagraph "c" of paragraph 1-4 of section 1 of the Civilian Personnel Regulations of the Department of the Army relating to the subject of hours of work was revised to read as follows:

> c. The basic tour of duty is the 40-hour workweek, established pursuant to the statutes cited in paragraph 1-2. Service during the basic tour of duty is compensated for at straight time rates as prescribed in CPR P11. Generally, the basic tour of duty will consist of five 8-hour days, Monday through Friday of each administrative workweek. For on-call employees, the basic tour of duty *is a 60-hour workweek, consisting of five 12-hour periods (paragraph e below)*.

(c) In December 1952, subdivision (4) of subparagraph "a" of paragraph 3-3 of section 3 of the Civilian Personnel Regulations of the Department of the Army relating to the subject of hours of work was revised to read as follows:

> (4) The established tour of duty must prescribe a definite number of stand-by hours on duty, followed by a definite number of hours off duty. A minimum of 60 stand-by hours (the basic tour of duty) during each administrative workweek is required, *and normally will consist of two 24-hour periods and one 12-hour period*. Where a regularly scheduled overtime period is required, the on-call tour of duty may not exceed a maximum of 72 hours, consisting of 60 basic hours (five 12-hour periods) and 12 overtime hours. For pay purposes, each hour of the on-call tour of duty is computed at two-thirds of the appropriate rate(s) of pay. The time allowed for sleeping and eating (normally 8 hours during each 24-hour period), need not be identified for pay purposes. See CPR P11.

39. The Civilian Personnel Regulations of the Department of the Army relating to hours of work were revised on November 3, 1954, as of the first day of the first pay period beginning after October 31, 1954, to read in part as follows:

Section 1

General Provisions

SCOPE AND COVERAGE

* * * * *

[1-1.] b. These regulations provide the requirements for fixing tours of duty for all employees of the Army Establishment, wherever located, regardless of their tenure of employment and legal basis for computing their pay. * * *

LEGAL BASIS

Classification Act Employees

1-2. a. Section 604(a), Federal Employees Pay Act of 1945 (5 U.S.C. 944, as amended, see chapter Z1, Federal Personnel Manual) contains the procedures, as indicated in (1) through (6) below, with respect to tours of duty for all full-time employees subject to the compensation schedules of the Classification Act of 1949 (5 U.S.C. 1071, as amended, see chapter Z1, Federal Personnel Manual). While these provisions apply specifically to employees holding Classification Act positions, they are considered to be evidence of a Congressional policy that should apply to all employees. Therefore, these same principles will be applied to the establishment of tours of duty for Wage Board employees. Exception to the following principles will be made only in those cases where commanding officers of installations determine that their application would seriously handicap the performance of a function or where substantially increased costs would result.

(1) There will be established a basic workweek of 40 hours.

(2) Assignments to tours of duty will be scheduled in advance and the assignments to a tour shall cover periods of not less than one week.

(3) The basic 40-hour workweek will be scheduled on 5 days, preferably Monday through Friday, and the two days outside the basic workweek will be consecutive.

(4) The working hours for each day in the basic workweek will be the same and the basic nonovertime workday will not exceed 8 hours.

(5) The basic workweek will not be altered because of the occurrence of a holiday.

(6) Daily tours of duty will not be broken by off duty periods of more than one hour.

Wage Board Employees

b. (1) Section 23, act 28 March 1934 (48 Stat. 522; 5 U.S.C. 673c) fixes the basic workweek at not more than 40 hours for employees in the several trades and occupations whose compensation is determined by wage boards and other wage fixing authorities (within the Army Establishment, the Army-Air Force Wage Board. See CPR P2).

(2) Section 1, act 1 August 1892 (40 U.S.C. 321), as amended (generally referred to as the Eight-Hour Law), establishes an 8-hour day for all employees classified as laborers and mechanics employed on a public work of the United States. Executive Order 10251, however, suspends application of the statute for the duration of the emergency for such personnel employed by the Department of Defense on any work essential to national defense (sec. 4).

* * * * *

DEFINITIONS

* * * * *

Tour of Duty

[1–4.] b. Tour of duty refers to the hours of the day, and the days within an administrative workweek, *fixed in advance*, during which the employee is required to perform service on a regular, repetitive basis. As used in these regulations, an employee's tour of duty consists of his basic tour of duty and any overtime work that is scheduled to be performed on a regular, repetitive basis.

Basic Tour of Duty

c. The basic tour of duty is the 40-hour workweek, established pursuant to the statutes cited in paragraph 1–2. Normally, the basic tour of duty will consist of five 8-hour days, Monday through Friday of each administrative workweek.

Rotating Tours of Duty

d. Rotating tours of duty are those regularly scheduled tours which periodically require service on a different shift.

Standby Tour of Duty

e. A basic tour of duty involving regularly scheduled standby time is defined as a standby tour of duty; that

is, where the employee is not required to devote all of his time in actually performing services, but nevertheless is required to remain at or within the confines of his post of duty to perform service when called or when the need arises. (Sec. 3.)

Part Time Tour of Duty

f. A part time tour of duty is a scheduled tour of less than 40 hours which requires service on a regular, repetitive basis on one or more days of each administrative workweek.

Regularly Scheduled Overtime

g. Regularly scheduled overtime refers to the periods in the administrative workweek, in excess of the basic tour of duty, during which the employee is required to perform service on a regular, repetitive basis.

Irregular or Occasional Overtime

h. Irregular or occasional overtime is authorized service performed at infrequent intervals which is [in] excess of the hours established for the regularly scheduled tour of duty as defined above.

* * * * *

Section 2

Establishing Tours of Duty

GENERAL PROVISIONS

2-1. This section contains instructions regarding those matters which must be considered in establishing tours of duty. Additional instructions regarding standby tours and tours for laborers and mechanics are contained in sections 3 and 4, respectively. Tours of duty are the means by which management schedules personal services to assure necessary and efficient production. They identify the hours of the day and the days of the week during which employees may be held responsible for being on duty and for which compensation normally is paid. Additionally, tours of duty provide a basis for the accrual and grant of leave (see CPR L1). As a general rule, tours of duty will be established on an installation-wide basis. Commanding officers, as part of their management function, have the responsibility of planning and establishing tours of duty required for performance of the functions of the installation. Where intermittent (when actually employed) personnel are being utilized

on a regularly scheduled basis, or whenever it is contemplated that regularly scheduled service will be required on at least 1 day of each administrative workweek, appropriate tours of duty will be established. Although tours of duty are established at the discretion of commanding officers, there must be assurance that they are proper in terms of age, health, sex, and prescribed statutory requirements (par. 1-2). Where it is necessary to establish tours on a basis other than the normal 8-hour day Monday through Friday, the necessity for the tour should be explained to the employees affected, and if possible the employees' views should be obtained as to the exact tours to be established.

Advance Notice

a. All tours of duty (including irregular or unusual tours) will be established at least 1 week in advance by the commanding officer or his designated representative and will be announced in writing. The announcement will identify the calendar days and the hours of each day comprising each tour. Copies of the announcement will be posted in conspicuous places, readily accessible to all affected employees. In the case of irregular or unusual tours for individual employees or special groups of employees, written notification will be given to affected employee(s), supervisor(s), time and attendance clerk(s), and the payroll office.

Changes in Tours

b. Changes in established work schedules will be made in writing, with as much advance notice to employees as possible. Arbitrary changes in starting time and frequent fluctuations from day to night shifts will be avoided. Where changes from day shifts to night shifts are necessary, it is generally desirable for employees to remain on one shift a minimum period of at least 2 weeks (a period corresponding to the established pay period). A period of at least 4 weeks (two pay periods) is even more desirable. Tours of duty will not be changed for the purpose of avoiding or creating the necessity for payment of overtime, night differential, or holiday pay.

* * * * *

OVERTIME HOURS

2-3. a. Overtime services of civilian employees, except as necessitated because of disaster or emergency,

may be utilized only to meet essential deadlines or to maintain vital operations. When so utilized it will be restricted to the absolute minimum required for the accomplishment of the project. Hours of work may be increased either as an extension of the established basic tour of duty or on an intermittent overtime basis. Commanding officers will install appropriate controls to assure that all authorized overtime conforms to the above policy.

b. Commanding officers should delegate authority to specific officials by position to order and approve performance of overtime work (see par. 3, DA Orders B, quoted in par. 1-3). The signature of such official on the time and attendance report will satisfy the requirement that overtime be duly ordered or approved. When overtime work is duly ordered or approved, and performed, employees may not be denied pay therefor, unless compensatory time off is required or taken by per annum employees in accordance with CPR L1.7-4.

Conversely, employees cannot obligate the Government for overtime work performed on their own initiative.

c. When tours of duty are established to include regularly scheduled overtime, the following principles will be observed:

(1) The use of regularly scheduled overtime periods will be kept to an absolute minimum, and limited to those activities of an installation where the need therefor is established. In all cases, actual operating needs will be the basis for such schedules.

(2) Except under extraordinary circumstances, regularly scheduled overtime hours will not be directed in excess of 48 hours in an administrative workweek.

(3) Before approving an overtime schedule, every effort should be made to eliminate the necessity for the overtime work through assignment of personnel from activities in which the workload has decreased, through recruitment of additional personnel within prescribed personnel authorizations, or through rescheduling basic tours of duty.

(4) Regularly scheduled overtime tours should be approved for as short a period as possible, and renewed only if absolutely necessary.

(5) The overtime hours should be scheduled on Saturday, if possible.

* * * * *

Section 3

Tours of Duty Involving Standby Time

GENERAL PROVISIONS

3–1. There are certain activities in the Army Establishment which require the presence of employees for longer than 40 hours per week, although actual work is not required for the entire period. These situations are covered either by the establishment of a standby tour or by requiring standby time in addition to a basic 40 hour workweek. Standby tours and tours including standby time are distinguished from tours extending beyond 40 hours per week because of the necessity for continuous work performance. Tours regularly including continuous work performance beyond 40 hours per week are regularly scheduled overtime tours.

Standby Tours

a. A standby tour is one which does not involve the regular continuous performance of work on a scheduled basis but does require that employees be available to perform work as the need arises. Typical of standby tours are those of firefighters who are on a tour of duty of the 24 hour on, 24 hour off type for a total of 72 hours per week. Standby tours of duty, with a schedule of 60, 72, or 84 or more hours of duty per week may be established for employees other than firefighters in accordance with paragraphs 3–3b and 3–7.

Tours Including Standby Time

b. Tours including standby time are those where a basic 40 hour tour of duty is established during which continuous work performance is required, and, *in addition*, the employee is regularly required to remain on standby duty each week for—

(1) A minimum of 14 hours on regular work days or extending into a non-work day, or

(2) A minimum of 7 hours on one or more regular weekly non-work days.

Tours Including Standby Overtime

c. Occasionally, it may be necessary to establish tours of duty which, while requiring standby duty, do not meet the criteria for either a standby tour, a tour in-

cluding standby duty, or a regularly scheduled overtime tour. These occasions arise where—

(1) Standby time is not regularly required on a weekly basis but is periodically required on a less frequent basis, and

(2) It is known in advance that the performance of some work will be required during the standby time.

An example of these situations is the tour of duty of a doctor who regularly works 40 hours per week and, in addition, is required every fourth week to remain on duty continuously for 24 hours during which intermittent work is performed (par. 3–6).

DETERMINING STANDBY STATUS

3–2. The determination of whether a given period is standby time for compensation purposes (CPR P1.6) depends upon the conditions and circumstances of the employment. The mere fact that an employee is available to perform service or is available to receive a call is not in itself sufficient to constitute either a standby tour or a tour including standby time. His whereabouts and his freedom of choice to follow his normal living habits and to engage in personal activities at places of his own choosing, must be limited by the conditions of his employment (rather than geographical location) for the benefit of the Government. Standby time is time during which an employee is available to perform service but is not required to perform actual work and is free to eat, sleep, read, listen to the radio, or engage in other similar pursuits. An employee, is performing actual work, rather than being in a standby status, when his full attention is devoted to his work, even though the nature of his work does not require constant activity (for example, a guard on duty at his post and a technician continuously observing instruments are engaged in the actual work of their positions).

Restrictions Because of Geographical Location

a. An employee's acceptance of the duties to be performed in a given position carries with it a responsibility on his part to limit his off-duty activities to the extent that he is available for duty on his next workday. There are certain employments, however, which require a narrower limitation of an employee's off-duty time because of the geographical location of the work site and/or the nature of the duties to be performed. This

is particularly true of caretakers and similar personnel who live on the premises, and other workers such as surveyors and members of field groups whose duties are at isolated locations, and who may live continuously in camps and have, in effect, combined living and duty stations. Such limitations are of natural origin, are not the result of employment conditions within the control of the Army Establishment, and are not deliberately required by the Army Establishment for the benefit of the Government. In such cases, an employee's off-duty time is not compensable standby time, even though he may be required to remain at his work site, and is available to perform service whenever the need arises. Actual service required beyond completion of the basic tour and during any normal off-duty period would be considered overtime.

Restriction of Employee's Freedom

b. To constitute a standby tour of duty or standby time there must be a definite requirement and it must be officially ordered that the employee remain at or within the confines of his post of duty. This requirement must be associated with the regularly assigned duties of the employee's position, either as a continuation of his regular duty, or as a requirement to be present to perform work when the necessity arises. The employee may be required to remain at any one of the following locations depending upon the activity in which engaged:

(1) At his regular post of duty.

(2) In quarters provided by the Government, which are not the employee's living quarters, and which are specifically provided for use of personnel required to be present in readiness to perform actual work when the need arises or when called.

(3) In the employee's living quarters, when designated as his duty station and when his whereabouts is narrowly limited and his activities are substantially restricted. This condition exists only during periods when employee is required to remain at his quarters and is required to hold himself in a state of readiness to answer calls for his services. This limitation on an employee's whereabouts and activities is distinguished from the limitation placed on an employee who is subject to call outside his regular hours of duty but may leave his quarters, provided he arranges for someone else to respond to calls or leaves a telephone number by which he can be reached should his services be required.

CRITERIA FOR STANDBY TOURS OF DUTY

3–3. Work schedules in which the basic tours of duty are comprised primarily of regularly scheduled standby time (pars. 3-1a and 3–2) are identified as standby tours of duty. Employees assigned such schedules are identified as standby employees. (Employees who are assigned regular tours of duty of 40 basic hours each week and who in addition perform standby duty (par. 3-1b) or standby overtime (par. 3–1c) are not identified with this group.)

Requirements To Be Met

a. The following factors must be present in all cases for the establishment of a standby tour of duty:

(1) The character of the duties to be performed must be such that the need therefor is unpredictable, such as fires.

(2) The entire time must be spent at the employee's post of duty (as contrasted to his place of residence).

(3) Eating and sleeping facilities must be provided at the post of duty.

(4) A substantial part of the tour of duty, at least 25 percent, consists of remaining in a standby status rather than performing work.

Restrictions on Use

b. Standby tours of duty are established by these regulations for firefighters (par. 3–4). Commanding officers may establish standby tours of duty for firefighter guards where the situation meets the requirements set forth in this section. Where it is considered desirable to establish standby tours of duty for any other group of employees, prior approval must be obtained in accordance with paragraph 3–7.

* * * * *

CRITERIA FOR TOURS INCLUDING STANDBY TIME

3–5. Tours of duty which include a requirement for standby time (par. 3–1b) may be established only with prior approval (par. 3–7).

STANDBY OVERTIME

Criteria

3–6. a. Standby overtime (par. 3–1c) represents additional hours that regular full time employees, excluding

those having standby tours, and those whose tours include standby time, may be required to spend at the work site outside their regularly scheduled tour of duty. In order to consider these hours as compensable overtime hours the following requirements must be observed:

(1) The standby time must be required on a regular basis which is less frequent than weekly.

(2) There must be a requirement known in advance for the performance of intermittent work during the standby period.

(3) Aside from the requirement for intermittent work the period must otherwise meet the criteria for standby status.

(4) The standby time will be limited to situations requiring a *minimum* of 16 consecutive hours of coverage, in addition to the employee's regular daily tour. The standby time must be spent at the employee's post of duty (as contrasted to his place of residence).

(5) Eating and sleeping facilities must be provided at the post of duty.

(6) For pay computation purposes, each hour of the occasional standby time will be applied on a one-half basis; that is, compensation will be computed at one-half of the employee's overtime rate of pay for his regular position. The time allowed for sleeping and eating (normally 8 hours during each standby period) need not be identified for pay purposes. Such standby hours do not represent a part of the employee's basic tour of duty for leave purposes.

Restriction on Use

b. The use of occasional standby overtime, as provided above, is restricted to doctors and nurses, unless prior approval for other classes is obtained in accordance with paragraph 3–7.

APPROVAL REQUIREMENTS

General

3–7. a. It is the desire of the Department of the Army that standby tours or work schedules involving standby time, other than those provided for above, be resolved on a normal basis wherever possible. Where up to 24-hour coverage is required, the possibility of establishing regular tours of duty on a rotating shift basis should be considered with personnel assigned to the shifts in accordance with the service required. The possibility of providing adequate coverage by requesting employees to

advise of their location for receiving possible emergency calls also should be considered.

Data Required

b. The following indicates the approval requirements for establishing standby tours of duty and other standby status for categories of employees not covered in this section. Each request for prior approval will be submitted to the office of civilian personnel, Office, Secretary of the Army, Washington 25, D.C. * * *

40. On April 17, 1957, paragraph 3–3 of section 3 of the Civilian Personnel Regulations of the Department of the Army relating to hours of work was revised to read in part as follows:

CRITERIA FOR STANDBY TOURS OF DUTY

3–3. Work schedules in which the basic tours of duty are comprised primarily of regularly scheduled standby time (pars. 3–1a and 3–2) are identified as standby tours of duty. Employees assigned such schedules are identified as standby employees. (Employees who are assigned regular tours of duty of 40 basic hours each week and who in addition perform standby duty (par. 3–1b) or standby overtime (par. 3–1c) are not identified with this group.)

Requirements To Be Met

a. The following factors must be present in all cases for the establishment of a standby tour of duty:

(1) The character of the duties to be performed must be such that the need therefor is unpredictable, such as fires.

(2) The entire time must be spent at the employee's post of duty (as contrasted to his place of residence).

(3) Eating and sleeping facilities must be provided at the post of duty.

(4) A substantial part of the tour of duty, normally an amount approximating the hours of actual work, consists of remaining in a standby status rather than performing work. In no instance may the standby time be less than 25 percent of the tour.

41. During the period of time involved in this litigation, the Civilian Personnel Regulations of the Department of the Army on the subject of computation of pay provided in part as follows:

Section 3

Overtime Pay

GENERAL PROVISIONS AND COVERAGE

3–1. Overtime rates are payable for all authorized hours of work in excess of 40 hours in a unit week to all Classification Act and Wage Board employees, except experts and consultants (see CPR P11.5). Modifications of this rule for employees subject to the 8-hour law and certain other employees are stated in paragraphs 3–3 and 3–4. However, as stated in CPR H2.5–6, when anyone in authority *requires* work in excess of 40 hours in a unit week, payment therefor must be made even though all overtime control requirements were not met through inadvertence or willful action. In all cases, the number of hours for which overtime rates are payable are computed for each unit week separately. In *no* case may hours worked in one unit week be combined with hours worked in another when determining whether overtime rates are payable. Special rules on on-call employees and experts and consultants are given in CPR P11–4 and 5.

OVERTIME RATES

Wage Board Employees

3–2. a. For all Wage Board employees, the overtime rate is 1½ times the basic rate of compensation (see par. 2–3). For certain trades and occupations, specific overtime rates other than time and one-half may be fixed by the Army-Air Force Wage Board to meet the standards and conditions in the industry concerned.

Classification Act Employees

b. Section 25.143, appendix A, these regulations, gives the rate of overtime compensation for Classification Act employees. The table given in paragraph (b) of that section is derived from a similar table prescribed by the Federal Employees Pay Act of 1945. For basic salary rates above $2,980 per annum, the overtime rate is somewhat less than time and one-half, and for salary rates above approximately $4,060 per annum, the overtime rate actually is less than the straight-time rate. The hourly overtime rates computed according to the note in paragraph (b) of the cited section are to be carried to seven decimal places. The formula to be used is as

follows, with X equalling the salary rate for which an overtime rate is desired:

$$\frac{894 - .076782 \times (X - 2980)}{416} = \text{the overtime hourly salary rate}$$

The hourly overtime rate for salaries of $6,440 or more per annum is $1.5104182. (The above formula is of use at the present time mainly for computing overtime rates in oversea areas where the foreign service differential is applicable.)

HOURS FOR WHICH OVERTIME RATES ARE PAYABLE

General

3-3. a. In computing overtime compensation, the time worked will be considered in quarter-hour multiplies [sic] (CPR H2.2-23). Any work less than a 15-minute multiple will not be aggregated from day to day for pay purposes, but will be dropped on a daily basis For overtime *pay purposes*, there is at present no difference between regularly scheduled overtime and irregular or occasional overtime, although there is a difference when considering court leave (CPR L1.8), and pay when traveling (CPR P11.6), and there may be a difference for reporting purposes.

White Sands Regulations

42. On July 29, 1949, the commanding general at White Sands issued the following order regarding working hours at the installation:

1. The working hours at this activity are from 0745 hours (7:45 A.M.) until 1615 hours (4:15 P.M.) Monday through Friday of each week.

2. There will be a period of thirty (30) minutes for lunch for all military personnel and civilian employees, staggered as follows:

1130-1200 hours—Enlisted Men.
1130-1230 hours—Officers (any 30 minute period within the hour).
1145-1215 hours—Civilian employees.
1045-1100 hours—Early Mess (admittance by written pass only).

43. On December 14, 1951, the commanding general at White Sands issued a directive concerning the payment of overtime to Civil Service personnel. This directive provided in part as follows:

3. Overtime rates are payable for all authorized hours of work in excess of forty hours in a unit week to all graded and wage board employees (except experts and consultants). When anyone in authority requires work in excess of forty hours in a unit week, payment, therefore [sic], must be made even though all overtime control requirements were not met through inadvertence.

44. On March 3, 1954, the commanding general at White Sands issued instructions on the subject of "Standard Daily Working Schedule." These instructions provided in part as follows:

1. Basic Work Week.

a. The basic work week for regular civilian employees of this activity consists of 40 hours. The normal tour of duty is Monday through Friday, 8 hours each day from 0745 to 1615 hours, with 30 minutes for lunch.

b. The basic work week for guards is 42½ hours and the basic work week for firefighters is 60 hours.

c. Different tours of duty may be established for employees in utilities and service activities. Such irregular tours must be established in writing and the original signed copy on file in the Payroll Office.

45. On June 1, 1955, the commanding general at White Sands issued a set of Civilian Personnel Regulations, which superseded the previous instructions covering the same subject matter. These regulations contained the following provisions relative to the basic work week at the installation:

BASIC WORK WEEK

The basic work week for regular civilian employees of this activity consists of 40 hours. The normal tour of duty is Monday through Friday, 8 hours each day from 0745 to 1615 hours, with 30 minutes for lunch.

The basic work week for guards is 42½ hours and the basic work week for firefighters is 72 hours.

Different tours of duty may be established for employees in utilities and service activities. Such irregular tours must be established in writing and the original signed copy on file in the Payroll Office.

46. Under the date of March 20, 1957, a number of the civilian bus drivers at White Sands, including most of the plaintiffs, addressed the following letter to the Civilian Personnel Officer at White Sands on the subject of the bus drivers' tours of duty:

1. We understand it to be the policy of the Secretary of Defense (Manual for Operating Officials) that "employees shall be encouraged to express themselves concerning improvement of work methods and working conditions" and in that respect the matter of the interpretation and establishing of the tour of duty of bus drivers at White Sands Proving Ground has been discussed and taken up orally at a supervisory leval [sic] and no satisfactory solution having been obtained, it becomes necessary to submit the matter in writing to you for determination, so that we may then guide ourselves accordingly as to further action or appeal.

2. The tour of duty involving bus drivers has been counted as 8 hours, but in actual fact and practice it involves 12 hours—from 6:00 a.m. to 6:00 p.m. For instance, if a tour is from 6:00 to 8:00 in the morning and then from 12:00 to 6:00 in the afternoon, it overlooks the fact that the intervening 4 hours, 8:00-12:00 have had to be spent on the post and in the past it is our understanding that even annual leave for the intervening period was deducted from the employee if he were to leave the post and sometimes the gates are locked; further, during the intervening period it has often become and is necessary to have the bus checked for servicing or fixing of flats, or starting at least an hour before the scheduled driving period to have the bus picked up at a distant location. The statement of OPR H 2 [sic], Section 1-2a that basic daily tour of duty will not exceed 8 hours, which may be broken by off duty periods of more than one hour during which "employees will not be in a stand-by status nor will they be restricted from engaging in personal activities and may spend their off-duty hours as they see fit" overlooks the fact that realistically speaking the driver must be in a stand-by status with the distance from the base to Las Cruces and El Paso, how could it be possible for an employee desiring to go home to do as he saw fit and be back in time to pick up his bus at a point that would require him to start at least an hour or so before the scheduled driving period? Thus, he is in practicality perforce in a stand-by status or else he could not properly comply with the scheduled driving period. This is only an illustration of the problem revolved. For further illustration it may be indicated that a driver having to start at 4 o'clock has often had to start at about 3 o'clock in order to pick it up at the location of the bus. So technically he has to start at least at 3 o'clock. Also sometimes he has to have the bus gassed up or serviced considerably in advance of the scheduled driving period.

3. It is our understanding, therefore, that the established tour should be considered as 12 hours and that compensation on that basis should be afforded, or else that a tour of duty be established with no split shifts. Further, from informal discussion it has been indicated that the operating practice involving 12 hours without compensation for the extra 4 hours is contrary to Civil Service regulations or governmental policy. It is also our understanding that personnel who operate on any comparable basis at the base are paid overtime, for instance we understand that fireman [sic] on stand-by status get paid for intervening time and likewise the security guards.

4. From the foregoing it should be apparent that we feel aggrieved by the existing working method and practice and that, if necessary, this may be considered an expression of grievance to invoke the necessary procedure for determination as to whether we should not be entitled for the pay for stand-by status time, or a regular and proper tour of duty be established. A reply in writing is desired so that if satisfactory resolution is not effected, we would like to then appeal directly to the Civil Service Commission.

47. After a meeting had been held to discuss the bus drivers' letter of March 20, 1957, the following response to that letter was made by the Civilian Personnel Officer at White Sands under the date of March 27, 1957:

Receipt is acknowledged of letter dated 20 March 1957, subject, "Tour of Duty Involved by Bus Drivers at White Sands Proving Ground," which was signed by 44 employees of the Motor Pool.

In order to furnish the information requested in the letter and to explain the regulations and policies relating to the employment situation of bus drivers, a meeting was held at 0900 hours, 27 March 1957, at the Motor Pool Office, attended by Major Miltonberger and members of his staff; Mr. Rafael C. Salas, Mr. George Pointon Jr., Mr. Vick V. Serna, and Mr. William Bassford, representatives of the employees who signed the subject letter. Mr. Salas was designated as the person to whom this reply should be addressed.

This is to confirm the matters discussed at the meeting and the explanations of the various regulations pertaining to the problem.

A WSPG Regulation has been written and is in process of publication which authorizes the establishment of regular tours of duty for bus drivers and other factors

relating to their hours of work and assignments. Copies of this regulation when published will be furnished by the Post Transportation Officer to each employee concerned.

This letter refers to CPR H2 and the policy that "Daily tours of duty will not be broken by off duty periods of more than one hour." The same regulation in paragraph 1-2a, provides that exceptions to these principles will be made when Commanding Officers consider it necessary, and in consideration of the situation at this Proving Ground, it has been determined that off duty periods of more than one hour is necessary for bus drivers.

The regulations provide that when an employee's freedom to engage in personal activities, during his off duty periods, is limited by geographical location, it is not standby time, nor is it compensable. If an employee is required to be "on call" because of his employment, such as a fire fighter who must be ready in case of a fire and his freedom of activity is restricted because of his employment as a fire fighter, then it is standby time. However, in the case of bus drivers, their only restriction is because of geographical location—the fact that we are out in the middle of the desert; and they are not restricted because of their particular job, and, therefore, they are not on standby time.

The schedule of hours of duty for each bus driver is posted on bulletin boards, in advance. This schedule shows the 8-hour daily tour of duty and the time of starting and ending of each work period. If an employee is required to work extra time either before or after the 8-hour tour of duty, he is entitled to overtime pay. However, he must be directed to perform the extra work in order to receive overtime pay, and if he does work "overtime" on his own initiative without instructions to do so from proper authority, he is not entitled to overtime pay. The time required for an employee to travel from his home or from some other place to his place of duty is not duty time; nor can the employee be paid for this travel time.

The foregoing explanations were given to all persons present at the meeting, and all four representatives of the bus drivers expressed their satisfaction with the explanation, and were asked to advise their co-workers regarding the matters discussed.

Should there be any further questions or dissatisfactions regarding this matter, it is suggested that they be presented, through your supervisor, to the Post Transportation Officer, who either will answer your questions

or take the matter up with proper authority to get the replies for you. It is requested that this letter be made available to all the bus drivers to read, and it is hoped that it clarifies the situation to the satisfaction of everyone.

48. On March 28, 1957, the provisions of the Civilian Personnel Regulations at White Sands relative to the basic workweek (see finding 45) were expanded by the addition of the following numbered paragraphs:

1. It is considered that application of the principles specified in CPR H2, Section 1-2a [see page 48], for the establishment of regular tours of duty for employees, would seriously handicap the effectiveness of the bus transportation facilities of this activity and would result in additional costs due to excessive overtime, if applied to the tour of duty for bus drivers.

2. Exception to the referenced tour of duty is authorized for bus drivers to provide for irregular tours of duty to be established by the Post Transportation Officer, White Sands Proving Ground, New Mexico.

3. The basic daily tour of duty for bus drivers will not exceed eight hours of duty, which may be broken by off duty periods of more than one hour. During the off duty periods, employees will not be in a standby status, nor will they be restricted from engaging in personal activities, and may spend their off duty hours as they see fit.

4. All tours of duty for bus drivers will be established at least one week in advance, and will be announced in writing identifying the calendar days, the duty hours of each day, and the names of employees assigned. Copies of the announcement will be furnished each employee and supervisor affected, time and attendance clerks, and the Payroll Office. Copies will also be posted on bulletin boards accessible to affected employees.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs Jose V. Baca (1), Floyd D. Campbell (4), J. E. Jones (13), Rodolpho Martinez (17), and James M. Simpson (22) are entitled to recover, and judgment will be entered to that effect. The amount of recovery will be determined pursuant to Rule 38(c).

The court further concludes as a matter of law that the plaintiffs Verney R. Bunch (3), Cecil F. Gillespie (9), Werttie L. Haney (12), and Vick V. Serna (21) are not entitled to recover, and the petition will therefore be dismissed as to them.

U.S. GOVERNMENT PRINTING OFFICE 1966

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 405

JOSE V. BACA, et al., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its Order of November 14, 1960 denying the Petition for Writ of Certiorari and that a Writ of Certiorari issue to review the judgment of the United States Court of Claims in the above entitled case as prayed for in the Petition filed September 9, 1960.

Reasons for granting rehearing and issuing of the Writ

Following the Order of this Court on November 14, 1960 denying the Petition for Certiorari filed herein a Petition was filed for Writ of Certiorari to the United States Court of Claims in another case involving a slightly different factual basis but a similar and closely related legal issue. In that case, *William Ahcaru, et al.* v. *United States*, No. 544, this Court is requested, inter alia, to rule on the extent to which the government by designating more than the usual 8 hours a day as sleeping time may thereby discharge its admitted obligation to compensate federal employees working on a 24 hour tour of duty for waiting time on government property which would otherwise fall within their compensable working hours. The *Ahcaru* opinion and the arguments presented in the Petition to review that decision are a new and further indication of the importance to federal employees of an issue raised in the Petition in *Baca* v. *United States*, No. 405, namely, the propriety of a designation by the government of stand-by time spent at a remote installation as "off-duty time" in order to avoid inclusion of the time in the compensable hours of employment. In *Ahcaru*, it appears, time devoted to an employer was rendered non-compensable by its resignation as "sleeping time". In *Baca*, the same result was achieved by its designation as "off duty time". In both situations the employees could not use the time effectively for their own purposes. Though the *Ahcaru* case presents additional issues, counsel believes that should this Court grant certiorari in the *Ahcaru* case it would be appropriate for it at the same time to review the Court of Claims decision in the *Baca* case. Accordingly, petitioners respectfully move the Court to grant the Petition for a writ of certiorari requested herein.

or in the alternative to withhold ruling in this Petition for Rehearing until it acts on the *Ahearn* Petition.

Respectfully submitted,

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November 30, 1960.

Certificate of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

EDGAR H. BRENNER

FILE

Certificate of Service

I, Edgar H. Brenner, a member of the bar of this Court, hereby certify that on this 30th day of November, 1960, I served a copy of the foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari to the United States Court of Claims on the Solicitor General, Department of Justice, Washington 25, D. C. by mailing three copies thereof, first class postage prepaid, addressed to J. Lee Rankin, Esquire, Solicitor General of the United States at the address shown above, said service being in accordance with Rule 33(1).

EDGAR H. BRENNER